2-1-1994

Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany

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I. INTRODUCTION

Judicial discretion, particularly in the exercise of jurisdictional powers, is of questionable value and need. To analyze judicial discretion in civil versus common law jurisdictional systems, the doctrine of *forum non conveniens* serves as an excellent vehicle. From the perspective of this German-American jurist, there is no place for the doctrine of *forum non conveniens* in German law.

Part I of this Article briefly describes the scope and origin of *forum non conveniens*. In Part II, the Article gives a comprehensive and detailed overview of the rise of the doctrine of *forum non conveniens* in the United States and analyzes particular current developments in the area, including the recent decision of *Piper Aircraft Co. v. Reyno*.[1] Part II further considers parallel developments within the United States regarding intra-U.S. venue transfers pursuant to 28 U.S.C. § 1404(a), and their impact on *forum non conveniens*. Part II then concludes with an analysis of the current status of the doctrine and its applicability in the United States. Next, Part III considers *forum non conveniens* in the United Kingdom, including its historic and dogmatic developments, and critically analyzes the impact of the House of Lords' decision in *Spiliada Maritime Corp. v. Cansulex Ltd.*[2] Parts IV and V point out the differences between the United States and the United Kingdom in their practical application of *forum non conveniens* for cases involving German parties. Part V also introduces the Hague Convention on Civil Jurisdiction and Judgments as a determinative factor behind these differences, and provides a detailed analysis of the Hague Convention and the applicability of the doctrine within the scope of the Convention. Part VI then introduces the reader to *forum non conveniens* in European civil law countries, using Germany as an example. This Part provides a comprehensive and de-

1. 454 U.S. 235 (1981).
2. [1986] 3 All E.R. 843.

tailed overview of general principles and specific provisions evidencing tolerance for and acceptance of judicial discretion within a stringent system of jurisdictional powers. Part VI concludes with a critical analysis of the need for a doctrine of *forum non conveniens* within the procedural system of the German civil law. Finally, Part VII summarizes the current status of the *forum non conveniens* doctrine in such common law countries as the United States and the United Kingdom, and the civil law country of Germany. The Article concludes with a view on the existence of judicial discretion in the exercise of jurisdictional powers.

A. Scope of the Doctrine of Forum Non Conveniens

The doctrine of *forum non conveniens*, as employed today by state and federal courts of the United States and as recognized by international scholars, provides discretionary powers to courts to decline existing jurisdiction. The convenience of the parties involved, as well as the ends of justice, may be better served if the action is brought and tried in an alternative forum.[3] Accordingly, despite having jurisdiction in a particular case, a judge may declare the forum to be *non conveniens*, or "inconvenient."[4] Judges have almost uncontested discretion under the doctrine to refuse to take the case or to decide the case on the merits.[5]

The doctrine of *forum non conveniens* applies to cases of concurrent jurisdiction in both national and international cases. Its application presupposes that at least two fora are available in which a defendant is amenable to process without requiring strict *lis pendens* in the alternative forum.[6] Yet, the plaintiff must be able to raise a legal claim in the proposed alternative forum without being confronted by technical bars such as service of process or statute of

3. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947); Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 47, 62 (1986); *see also* Michael T. Manzi, Dow Chemical Co. v. Castro Alfaro: *The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation*, 14 FORDHAM INT'L L.J. 819, 820-21 (1990-91) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1969)); *cf.* 28 U.S.C. § 1404(a) (1948) (explaining the rationale underlying venue transfers within the United States). *See also* discussion *infra* part II.

4. Berger, *Zuständigkeit und Forum Non Conveniens im Amerikanischen Zivilprozess*, 41 RABELSZ 39 (1977).

5. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

6. *Gilbert*, 330 U.S. at 507; *Piper*, 454 U.S. at 254 n.22.

limitations problems.[7] If these bars exist or the alternative forum does not permit litigation of the subject matter of the dispute, dismissal of the suit on the grounds of *forum non conveniens* is theoretically inappropriate.[8]

B. Origin of the Doctrine

The origin of the doctrine of *forum non conveniens* is predominantly found in Scottish law, which provided for dismissal of actions under the term of *forum non competens* as early as in the eighteenth century.[9] Despite the literal implications of this term, which point toward the court's lack of competence and, thus, lack of jurisdiction, courts used *forum non competens* in order to decline existing jurisdiction.[10] Consequently, the doctrine was renamed *forum non conveniens* by the end of the nineteenth century.[11] The Scottish created the doctrine to balance undue hardship arising out of *arrestment ad fundandam* jurisdiction, which existed when Scotland attached and seized foreign assets in order to force foreigners into Scottish courts.[12]

In *Sim v. Robinow*,[13] Lord Kinnear laid the foundation for Scotland's application of the *forum non conveniens* doctrine:

> The plea [for staying proceedings on the ground of *forum non conveniens*] can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.[14]

Although other courts previously applied this so-called "most suitable forum" approach, prior to 1892 their decisions lacked uniformity, and discretion was inconsistent and unpredictable. This

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7. *See* Hughes v. Fetter, 341 U.S. 609 (1951); Berger, *supra* note 4, at 52; Anton Schnyder, *Schweizerische Unternehmen und ausländisches Forum—insbesondere im Verhältnis zu den USA*, 3 SAG 137 (1985).

8. *Piper*, 454 U.S. at 251-52.

9. ALAN DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION 425 n.76 (1987); Berger, *supra* note 4, at 48.

10. Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1946-47); WAHL, DIE VERFEHLTE INTERNATIONALE ZUSTÄNDIGKEIT 46 (1974).

11. Edward L. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 389 (1947); Braucher, *supra* note 10, at 909.

12. A. GIBB, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 212-13 (1926); Berger, *supra* note 4, at 48.

13. 1892 Sess. Cas. 665 (Scot. 1st Div.).

14. *Id.* at 668.

inconsistency resulted from the coexisting "abuse of process" approach, which allowed the judge to exercise his discretion only in cases of vexation or oppression.[15] Nevertheless, with Lord Kinnear's statement in *Sim v. Robinow*,[16] and after further confirmation in *Société du Gaz de Paris v. SA de Navigation, "Les Armateurs Français,"*[17] the "most suitable forum" approach prevailed over the "abuse of process" standard.[18] Use of *forum non conveniens* during this period was limited, however, because courts did not apply it in favor of domestic defendants until the English case of *MacShannon v. Rockware Glass Ltd.*[19] in 1978.

II. Rise of the Doctrine of *Forum Non Conveniens* in the United States

A. The Pre-1947 Period

In the eighteenth century, U.S. courts already exercised judicial discretion in declining jurisdiction over "non-residents."[20] *Gardner v. Thomas*[21] and *Collard v. Beach*[22] are examples of cases where judges exercised jurisdictional discretion, and these cases are cited and referred to even by English courts.[23] Despite this apparent use of judicial discretion in the jurisdictional area, these cases never mentioned a *forum non conveniens* doctrine. Rather, judicial discretion in exercising jurisdiction was a consequence of the revolution in the American "conflict of laws" system, which, until then, had followed the continental European system rather than the English law.[24] The change was a movement away from a system of law based on the nature and purpose of the law and public interests, to one founded on principles of stability that still form the foundation of civil law systems today.[25]

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15. *See* discussion *infra* part III.B.1.

16. 1892 Sess. Cas. at 667.

17. 1926 Sess. Cas. 13 (Scot.).

18. David W. Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 Law Q. Rev. 398, 412 (1987).

19. 1978 App. Cas. 795 (appeal taken from Q.B.).

20. Wahl, *supra* note 10, at 48; *see* Manzi, *supra* note 3, at 823.

21. Gardner v. Thomas, 14 Johns. 134 (N.Y. Sup. Ct. 1817).

22. Collard v. Beach, 87 N.Y.S. 884 (1904).

23. *See* Logan v. Bank of Scot., [1906] 1 K.B. 141 (Eng.) (citing *Gardner* and *Collard*).

24. Berger, *supra* note 4, at 39.

25. *See generally* Joseph Story, Commentaries on the Conflict of Laws (1935); Joseph H. Beale, Treatise on the Conflict of Laws (1935).

As early as 1927, some states[26] provided for a general clause granting judges "discretionary power to decline jurisdiction over non-residents."[27] The existing discretion of courts in determining jurisdiction in admiralty cases, referencing "international comity,"[28] further facilitated the evolution of judicial discretion in the field of jurisdiction. Eventually, in 1929, after a line of cases dismissing suits on grounds similar to *forum non conveniens*, Paxton Blair labeled the principle using the established Scottish term of *forum non conveniens*.[29] His formulation was a significant contribution to the subsequent incorporation of the doctrine into U.S. law.

In 1932, the U.S. Supreme Court held that the exercise of discretionary powers by U.S. courts in declining jurisdiction should not be restricted to admiralty cases.[30] This decision opened the doors even further for a common acceptance of the *forum non conveniens* doctrine. Only nine years later, in *Baltimore & Ohio R.R. Co. v. Kepner*,[31] Justice Frankfurter characterized the doctrine as a "manifestation of a civilized judicial system firmly embedded in our law."[32] This statement represented the views of the judiciary and laid the foundation for an express approval and incorporation of the doctrine into American law.[33]

B. From 1947 to 1981

In 1947, the *forum non conveniens* doctrine finally enjoyed express acknowledgement.[34] In the leading case of *Gulf Oil Corp. v.*

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26. Maine adopted the general clause in 1927. Foss v. Richards, 139 A. 313 (M.E. 1927). New Hampshire adopted it in 1930. Jackson & Sons v. Lumbermen's Mut. Casualty Co., 168 A. 895 (N.H. 1930). Massachusetts adopted it in 1933. Universal Adjustment Corp. v. Midland Bank, 184 N.E. 152 (Mass. 1933).

27. WAHL, *supra* note 10, at 48.

28. Harold Kleinmann, *Admiralty Suits Involving Foreigners*, 31 TEX. L. REV. 889, 890 (1952-53).

29. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 21 (1929).

30. Canada Malting Co. v. Paterson S.S., 285 U.S. 413 (1932).

31. 314 U.S. 44 (1941).

32. *Id.* at 55-56.

33. Manzi, *supra* note 3, at 823. It should be noted that, despite judicial approval of the doctrine as early as in 1929, the doctrine had not been used very extensively except in maritime cases and cases concerning internal corporate matters. *Id.*

34. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); *see also* Koster v. Lumbermen's Mut. Casualty Co., 330 U.S. 518 (1947) (decided the same day as *Gilbert* and with the same holding concerning the *forum non conveniens* doctrine); Manzi, *supra* note 3, at 824-25.

Gilbert,[35] a resident of Virginia brought suit in federal court in New York City against a Pennsylvania corporation qualified to do business in both Virginia and New York. The plaintiff sought to recover damages for the destruction of its Virginia warehouse by fire resulting from the defendant's negligence. The district court's jurisdiction was based solely on diversity of citizenship and the venue was correct. Because all of the events giving rise to the litigation had taken place in Virginia,[36] however, the New York district court dismissed the action. The district court was reversed on appeal,[37] but the U.S. Supreme Court reversed the appellate court's decision, explicitly vesting discretion in the federal courts to dismiss actions on the grounds of *forum non conveniens*.[38]

It is very important to note that *Gilbert* involved solely domestic elements and parties. Nevertheless, *Gilbert* became the leading case for *all* federal *forum non conveniens* dismissals, regardless of whether they were admiralty, domestic, or international cases.[39] Thus, the domestically-originated doctrine, employed *inter alia* to avoid forum shopping by U.S. plaintiffs seeking higher damage awards and to correct exceedingly extensive or remote intra-U.S. jurisdictions, became a doctrine of international application.[40]

The Court in *Gilbert* abandoned a mere "convenience" test and provided a "specific-factors" test as the basis for dismissals. Under this test, courts must engage in a general weighing and balancing of private and public factors when determining the "most suitable" forum.[41] Private factors include: the ease of access to evidence; the availability of compulsory procedures for forcing attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the possibility of viewing premises, if appropriate to the action; the enforceability of judgments abroad; and all other practical problems that would promote an easy, expeditious, and inexpensive trial.[42] Public factors include: administrative difficulties flowing from court congestion ("crowded dockets"); the public

35. 330 U.S. 501.

36. Most of the witnesses resided there, and both state and federal courts in Virginia were available to the plaintiff and able to obtain jurisdiction over the defendant. *Id.* at 511-12.

37. *Gilbert*, 330 U.S. at 509-10, 512.

38. *Id.*

39. Robertson, *supra* note 18, at 400.

40. Barrett, *supra* note 11, at 380, 382, 399; Robertson, *supra* note 18, at 401.

41. Manzi, *supra* note 3, at 825 (citing *Gilbert*, 330 U.S. at 508).

42. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); *see infra* part II.F.1.

interest in having local controversies decided at home; the public interest in having the trial of a diversity case in a forum familiar with the applicable law; difficulties in the application of foreign law; avoidance of extensive forum shopping; and the unfairness of burdening citizens in an unrelated forum with jury and tax duties.[43]

A general or uniform codification of the *forum non conveniens* doctrine in state statutes does not exist, although there is a recommendation for such a codification of the doctrine in Section 1.05 of the Uniform Interstate and International Procedure Act of 1962.[44] Thus far, only a few states have complied with this recommendation;[45] a majority of states have solely "recognized" the common law doctrine of *forum non conveniens*,[46] while the remainder have explicitly refused to incorporate the doctrine.[47] Texas, for example, recently rejected the doctrine, at least with respect to wrongful death and personal injury actions, by referring to Section 71.031 of the Texas Civil Practice and Remedies Code.[48] The court reasoned that the doctrine of *forum non conveniens* had been statutorily abolished and that the doctrine was, therefore, no longer applicable under Texas law.[49] This decision terminated a procedural "run" of the plaintiffs (eighty-two Costa Rican residents) through Florida and California courts, where *forum non conveniens* had caused dismissals in each case they filed.

Despite the lack of explicit statutory language, the doctrine has been adopted and applied by a large number of U.S. state

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43. *Gilbert*, 330 U.S. at 509; *see infra* part II.F.2.

44. *See Uniform Interstate and International Procedure Act*, 11 AM. J. COMP. L. 418 (1962); *cf.* 25 WIS. STAT. ANN. § 262.19 (West Supp. 1990).

45. *See* ALA. CODE § 6-5-430 (1990); CAL. CIV. PROC. CODE § 410.30 (West Ann. 1973); LA. CODE CIV. PROC. ANN. art. 123(B)-(C) (West 1990); N.Y. CIV. PRAC. L. & R. 327 (McKinney 1990); N.C. GEN. STAT. § 1-75.12 (1990); WIS. STAT. ANN. §§ 801.52, 801.63 (West Supp. 1990).

46. Thirty-three states have "accepted" the common law doctrine. These states are Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, and West Virginia. For the seminal cases, see Manzi, *supra* note 3, at 821 n.9.

47. These states are Alaska, Georgia, Idaho, Montana, South Dakota, Texas, Virginia, and Wyoming. For the seminal cases, see Manzi, *supra* note 3, at 822 n.10.

48. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990); *see generally* Manzi, *supra* note 3, at 819-66 (discussing *Dow Chemical*).

49. *Dow Chemical*, 786 S.W.2d at 679. The court held that there was no good reason for the overworked courts of Texas to carry the burdens of other states.

courts.[50] A California appellate court has specifically pointed out, however, that the federal doctrine of *forum non conveniens* did not represent the law of *forum non conveniens* in California state courts.[51] Furthermore, Section 84 of the Second Restatement of Conflict of Laws[52] contains the idea of *forum non conveniens* as well, stating that a court may not exercise its jurisdiction if it is clearly and distinctly not the appropriate or convenient forum.[53]

C. *Parallel Development in Intra-U.S. Relations Through 28 U.S.C. § 1404(a)*

In 1948, a legislative change in procedural law affecting federal courts occurred that almost rendered the *forum non conveniens* doctrine unnecessary. With the introduction of venue transfers pursuant to 28 U.S.C. § 1404(a),[54] federal courts were vested with statutory powers to transfer inconvenient claims to a

50. *E.g.*, Running v. Southwest Freight Lines, 303 S.W.2d 578 (Ark. 1957); Price v. Atchison, T. & S.F. Ry., 268 P.2d 457 (Cal.), *cert. denied*, 348 U.S. 839 (1954); Winsor v. United Air Lines, Inc., 154 A.2d 561 (Del. 1958); People *ex rel.* Chesapeake & O. Ry. v. Donovan, 195 N.E.2d 634 (Ill. 1964); Whitney v. Madden, 79 N.E.2d 593 (Ill.), *cert. denied*, 335 U.S. 828 (1948); Gonzalez v. Atchison, T. & S.F. Ry., 371 P.2d 193 (Kan. 1962); Stewart v. Litchenberg, 86 So. 734 (La. 1920); National Tel. Mfg. v. DuBois, 42 N.E. 510 (Mass. 1896); Cray v. General Motors Corp., 207 N.W.2d 393 (Mich. 1973); Ramsey v. Chicago Great W. Ry., 77 N.W.2d 176 (Minn.), *cert. denied*, 352 U.S. 841 (1956); Strickland v. Humble Oil & Ref., 181 S.W.2d 901 (Tex. 1944); Qualley v. Chrysler Credit Corp., 217 N.W.2d 914 (Neb. 1974); James H. Rhodes & Co. v. Chausovsky, 60 A.2d 623 (N.J. 1948); De la Bouillerie v. De Vienne, 89 N.E.2d 15 (N.Y. 1949); St. Louis-S.F. Ry. v. Creek County, 276 P.2d 773 (Okla. 1954); Zurick v. Inman, 426 S.W.2d 767 (Tenn. 1968); International Sales & Lease, Inc. v. Seven Bar Flying Serv., Inc., 533 P.2d 445 (Wash. 1975).

51. Holmes v. Syntex Lab., Inc., 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984). Although there is often just a slight difference, if at all, between the state and federal doctrines of *forum non conveniens*, this presents the *Erie* conflicts of law question of which law to apply in a diversity case in front of a federal court. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). While this problem goes beyond the scope of this Article, it can be briefly stated that the majority of lower federal courts seem to hold that the state *forum non conveniens* doctrine in a diversity case does not bind federal courts. *Cf.* Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985). The latest decision pertaining to this question was issued by the Fifth Circuit Court of Appeals in Ikospentakis v. Thalassic Steamship Agency, 915 F.2d 176 (5th Cir. 1990), holding that *forum non conveniens* as a federal maritime defense is constitutionally supreme over state laws not recognizing the doctrine, thus reversing and remanding the lower court's denial of the doctrine as a defense. *Id.* at 180.

52. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1969).

53. *Id.*

54. The statute provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1948).

more appropriate forum in another state, providing the transferee court with immediate jurisdiction.[55]

By enacting 28 U.S.C. § 1404(a), Congress created a transfer rule that was subject to fewer objections than the *forum non conveniens* doctrine and could, therefore, be applied more liberally.[56] In particular, the "full faith and credit clause" of the U.S. Constitution,[57] which guarantees recognition of state decisions in every other state within the United States, contributed to venue transfers by supplanting interstate and intrastate *forum non conveniens* dismissals.[58] These venue transfers offered a higher degree of legal protection for the plaintiff.

Since *Van Dusen v. Barrack*,[59] this protection has not permitted a change in the applicable law due to venue transfers in diversity cases. The U.S. Supreme Court held that, following a defendant-initiated transfer under Section 1404(a), the transferee court must follow the choice of law rules prevailing in the transferor court.[60]

Further protection under Section 1404(a) is accorded by *Ferens v. John Deere Co.*,[61] where the Court extended the *Van Dusen* rule to *any* transfer, regardless of who initiated it. The *Ferens* Court based its decision on the policies behind Section 1404(a) and the congressional intent regarding the enactment of the statute as established in *Van Dusen*.[62] It found that, as a federal housekeeping measure, Section 1404(a) should neither deprive parties of state law advantages that exist absent diversity jurisdiction, nor provide opportunities for forum shopping. It should weigh considerations of convenience rather than possible prejudicial change in the applicable law.[63]

As a result of the domestic dominance of venue transfers, today the *forum non conveniens* doctrine is mainly applied in international cases.[64] The *Gilbert* holding shows, however, that the

55. Robertson, *supra* note 18, at 402-04.

56. Yet, some writers argue that 28 U.S.C. § 1404(a) is nothing but a codification at the federal level of the *forum non conveniens* doctrine. *Cf.* Manzi, *supra* note 3, at 821 n.8.

57. U.S. CONST. art. IV, § 2.

58. WAHL, *supra* note 10, at 61.

59. 376 U.S. 612 (1964).

60. *Id.* at 639.

61. 494 U.S. 516 (1990).

62. *Id.* at 525-27.

63. *Id.*

64. *See* Manzi, *supra* note 3, at 822.

application of the doctrine to international cases had not been contemplated when the doctrine was originally adopted.[65] Thus, venue transfers deprived *forum non conveniens* of its foundation, necessity, and original designation as domestic law, causing an unintended extension of the doctrine's applicability to mainly international cases.

D. The Piper *Decision*[66]

1. Facts and Procedure

In *Piper Aircraft Co. v. Reyno*, the heirs and next of kin of Scottish airplane passengers who had died in a 1976 airplane crash in Scotland sought damages in a wrongful death action.[67] They commenced an action based on negligence and products liability in a California state court against the manufacturer of both the plane (a Pennsylvania corporation) and the propeller (an Ohio corporation). Later, they removed the action to a federal district court of the same state, pursuant to 28 U.S.C. § 1441(a). The district court, in turn, ordered another venue transfer, this time to the U.S. District Court of the Middle District of Pennsylvania. The Pennsylvania district court dismissed the action on grounds of *forum non conveniens* because: (1) at the time the accident occurred, the plane was owned and operated by a Scottish air-taxi company in Scotland and the British Isles; (2) all victims, in whose names the suit was brought, were Scottish; and (3) investigations had been conducted by English and Scottish officials.[68] Moreover, the court stated that the plaintiffs only chose the American forum to obtain higher damage awards and to take advantage of the American pretrial discovery procedure.[69]

The court of appeals reversed and remanded the case, rejecting the district court's analysis of the *Gilbert* criteria and holding that an unfavorable change in substantive law might bar a *forum non conveniens* dismissal.[70] On appeal, however, the Supreme Court reversed again, holding that the weight of public and private interests made Scotland a better forum and that no

65. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

66. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

67. For a short discussion of the *Piper* case, see Manzi, *supra* note 3, at 826-27; for the facts, see *Piper*, 454 U.S. at 238-41.

68. Piper Aircraft Co. v. Reyno, 479 F. Supp. 727 (M.D. Pa. 1979).

69. *Id.*

70. Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980).

single factor of the *Gilbert* analysis, regarded alone, could be given determinative significance.[71]

2. Significance of *Piper*

In *Piper*, the U.S. Supreme Court made several important findings expressing the Court's attitude towards the doctrine of *forum non conveniens*:

1. The Court applied the doctrine of *forum non conveniens* for the first time in a case with a foreign plaintiff;[72]
2. The Court stressed that central emphasis cannot be placed on any one factor, including domicile or residence;[73]
3. The Court confirmed the shift from the "abuse of process" approach to the "most suitable forum" approach in the evaluation of the criteria. Nevertheless, the Court emphasized the difference between venue transfers under 28 U.S.C. § 1404(a) and dismissals on grounds of *forum non conveniens*;[74]
4. Finally, the Court issued guidelines to reduce the attractiveness of American courts to foreigners, particularly with regard to preventing undue forum shopping.[75]

The Court's position demonstrates a principal abandonment of the American courts' protectionist attitudes, as it objectively equalizes all factors and criteria in determining an appropriate forum. Although each individual factor is subjectively evaluated and weighed according to a judge's discretion, generally no determinative significance may be attributed to any single factor. Thus, the possibility of an unfavorable change of substantive law in the alternative forum would be considered, but would not be dispositive.[76]

The *Piper* opinion suggests that more weight is given to an American plaintiff's forum choice than to a foreigner's forum choice,[77] largely due to the court's interest in discharging its heavy case load and in further protecting domestic plaintiffs. Still, the "most suitable forum" approach applies the *forum non conveniens* doctrine more liberally in cases involving foreign parties.[78] Prior to

71. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981).
72. *Id.* at 255-56.
73. *Id.* at 248-50.
74. *Id.* at 253-55.
75. *Id.* at 251-52.
76. *Piper*, 454 U.S. at 248-49.
77. *See id.* at 255-56.
78. Robertson, *supra* note 18, at 405.

Piper, courts could rarely obtain a dismissal of an American plaintiff's action, because the "abuse of process" approach required "vexation" or "oppression" of the defendant.[79] Yet, *bona fide* plaintiffs were supposed to have an almost invincible right to commence a legal action in their home countries.[80] Although this right appears to be more limited today, the guidelines issued by the Supreme Court require a more liberal application of *forum non conveniens*. As a result, in cases where foreigners are involved, the court favors American parties, because domestic cases are governed by 28 U.S.C. § 1404(a).[81]

It is important to note the Court's emphasis on the distinctions between the two procedural devices.[82] The Court cautions parties not to draw analogies between *forum non conveniens* dismissals and venue transfers pursuant to Section 1404(a).[83] Although the draft of Section 1404(a) appears to be consistent with the doctrine of *forum non conveniens*, the purpose of Section 1404(a) was to permit a change of venue among federal courts on the federal level and, as such, intended to revise, rather than codify, the common law.[84] District courts have greater discretion to transfer under Section 1404(a) than to dismiss under the *forum non conveniens* doctrine.[85] Furthermore, in *Van Dusen*, the Court construed Section 1404(a) as precluding a change in the applicable law upon venue transfer.[86]

Hence, there is a clear difference between a transfer and a dismissal where issues involve discretion, restriction of transfers to the federal system, potential changes in the applicable law, and original congressional intent behind Section 1404(a). Thus, any inference that the liberalization of dismissal requirements was intended to equalize "dismissals" and "transfers" is inaccurate.[87]

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79. Sim v. Robinow, 1892 Sess. Cas. 665 (Scot. 1st Div.).

80. Robertson, *supra* note 18, at 401.

81. *Piper*, 454 U.S. at 255.

82. *Id.* at 236.

83. *Id.*

84. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981) (citing Norwood v. Kirkpatrick, 349 U.S. 29 (1955)).

85. *Id.*

86. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

87. *Piper*, 454 U.S. at 264.

E. Reasons for the Expansion of the Doctrine of Forum Non Conveniens

1. Limitation of Excessive Jurisdiction

Originally created to limit the effect of the excessive Scottish *arrestment ad fundandam* jurisdiction,[88] the *forum non conveniens* doctrine has always had a balancing and equalizing character.[89] This is evidenced in the application of the doctrine in the United States to restrict further the liberalization of *in rem*, *in personam*, and *quasi in rem* jurisdictions.

The continuing liberalization of jurisdictional requirements reached its peak with *International Shoe Co. v. Washington*,[90] where the Supreme Court held that "minimum contacts" were sufficient to obtain jurisdictional power over an absent defendant. The Court found that such jurisdictional power would not violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution[91] if its exercise was consistent with "traditional notions of fair play and substantial justice."[92] While the holding of *International Shoe* was confined to *in personam* jurisdiction, *Shaffner v. Heitner*[93] extended such jurisdictional power to *quasi in rem* situations.

According to the so-called "transient rule," even the defendant's temporary presence in the forum state creates jurisdiction.[94] This rule was challenged in *Burnham v. California*,[95] but the U.S. Supreme Court upheld the lower court's decision, affirming that physical presence and in-state personal service of process are sufficient for *in personam* jurisdiction.[96] The Court held that such a jurisdictional basis did not violate the Due Process Clause of the Constitution because it complied with traditional notions of "fair play and substantial justice."[97] Furthermore, most states have stretched their long-arm statutes to the limits of due process, and

88. *See supra* note 12 and accompanying text.
89. WAHL, *supra* note 10, at 42-43.
90. 326 U.S. 310, 316 (1945). *See* Berger, *supra* note 4, at 47.
91. U.S. CONST. amend. XIV.
92. *International Shoe*, 326 U.S. at 316.
93. 433 U.S. 186 (1977).
94. WAHL, *supra* note 10, at 43.
95. 495 U.S. 604 (1990).
96. *Id.* at 610-11.
97. *Id.* at 621.

do not even require presence in order to obtain personal jurisdiction over a defendant.[98]

This jurisdictional area demonstrates a clear difference between American and continental European law in the area of *in personam* jurisdiction. Under German civil procedure, service of process and jurisdiction are conceptually different and separate, i.e., service of process (*Zustellung*) presupposes jurisdiction of the court (*Zuständigkeit*).[99] By contrast, under U.S. law, one is conditioned by the other, i.e., service of process generally constitutes and affects the court's *in personam* jurisdiction. Based on the court's *de facto* power to render judgments *in personam* over defendants physically present within the territorial jurisdiction, *International Shoe* suggested the defendant's litigation-related "minimum contacts" as a new basis for *in personam* jurisdiction.[100] With this change, the American principle of conferring *in personam* jurisdiction by personal service of process must be considered from a different perspective.

The general expansion of jurisdictional bases and the simultaneous liberalization of jurisdictional requirements resulted in a need to restrict such vast judicial powers. A liberal application of the *forum non conveniens* doctrine offered the necessary counterbalance.[101] On one hand, jurisdictional powers could be used sparingly, with the potential emergency brake of the *forum non conveniens* doctrine balancing the effect of jurisdictions that are too extensive and remote.[102] On the other hand, the liberal use of jurisdictional powers demands an increase in power to limit those jurisdictions. Thus, in order to make a just and flexible application possible and to form an adequate balancing mechanism, the standard for *forum non conveniens* dismissals had to be changed from the "abuse of process" approach to the "most suitable forum" approach.

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98. WAHL, *supra* note 10, at 40.

99. *See generally* GERICHTSVERFASSUNGSGESETZ [GVG] (F.R.G.); ZIVILPROZESSORDNUNG [ZPO] §§ 1-11, 166-213a (F.R.G.).

100. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

101. Schnyder, *Gerichtliche Zuständigkeit in den USA bei Sachverhalten mit Auslandsberührung*, 38 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 45, 48-49 (1982).

102. Berger, *supra* note 4, at 42.

2. Crowded Dockets and Forum Shopping

Due to improved means of transportation and communication, international trade and business grew significantly in the 1970s, and the number of international legal controversies increased accordingly.[103] This rapid growth burdened the entire U.S. judiciary and resulted in the delay of domestic trials. Eventually, the need of U.S. citizens and residents for speedy trials and the unwillingness of judges to deal with foreign cases created an increase of *forum non conveniens* dismissals.[104] Thus, while the Supreme Court principally rejects convenience and judges' unwillingness as irrelevant factors in motions for dismissals, in *forum non conveniens* cases, they are accepted justifications.[105]

With the increasing number of international cases, the United States became favored over other more closely-related fora. Plaintiffs anticipated higher damage awards as well as procedural advantages arising out of the U.S. discovery procedure. This calculated choice of forum based on applicable law is characterized as "forum shopping."[106] The United States has sought to reduce the attractiveness of its courts by increasing the number of *forum non conveniens* dismissals.[107]

F. Criteria for Discretionary Dismissals

Even though the doctrine lacks codification, U.S. courts have established some guidelines in exercising discretion. A California state court opinion outlined an extensive list containing the twenty-five factors for *forum non conveniens* dismissals.[108] Nonetheless, the main basis and leading cause for every dismissal is still the *Gil-*

103. Robertson, *supra* note 18, at 407.

104. *Id.* at 407-08.

105. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

106. *See* 1 KROPHOLLER, HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS n.159 (1982).

107. *See Piper*, 454 U.S. at 252.

108. Great N. Ry. v. Alameda County, 12 Cal. App. 3d 105, 113-14, 90 Cal. Rptr. 461, 466-67, *cert. denied*, 401 U.S. 1013 (1970). The court listed the following criteria:

1. The amenability of the defendant to personal jurisdiction in the alternative forum;
2. The relative convenience to the parties and witnesses of trial in the alternative forum;
3. The differences in conflict of law rules applicable in this state and in the alternative forum;
4. The principal place of business of the defendant;
5. Whether the situation, transaction or events out of which the action arose exist, occurred in, or had a substantial relationship to this state;

bert decision, which divides the critera into two groups: private interests and public interests.

1. Private Interests

Private interests focus on practical factors that provide for a speedy, inexpensive, expeditious, and efficient trial. These practical factors include: (1) the focal point of the facts; (2) the relative ease of access to sources of proof; (3) the availability of compulsory process for attendance of unwilling witnesses; (4) the cost of obtaining attendance of willing witnesses; (5) the possibility of viewing the premises; (6) the choice of law clauses and the applicable law; (7) the residence of the parties; (8) the potential abuse of

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6. Whether any party would be substantially disadvantaged in having to try the action (a) in this state, or (b) in the forum which the moving party asserts it ought to be tried;
7. Whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state;
8. Whether witnesses would be inconvenienced if the action were prosecuted (a) in this state, or (b) in the forum in which the moving party asserts it ought to be prosecuted;
9. The relative expense to the parties of maintaining the action (a) in this state, and (b) in the state in which the moving party asserts the action ought to be prosecuted;
10. Whether a view of the premises by the trier of fact will or might be necessary or helpful in deciding the case;
11. Whether prosecution of the action will or may place a burden on the courts of this state, which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state;
12. Whether the parties participating in the action have a relationship to this state which imposes upon them an obligation to participate in judicial proceedings in the courts of this state;
13. The interest, if any, of this state in providing a forum for some or all of the parties to the action;
14. The interest, if any, of this state in regulating the situation or conduct involved;
15. The avoidance of multiplicity of actions and inconsistent adjudications;
16. The relative ease of access to sources of proof;
17. The availability of compulsory process for the attendance of witnesses;
18. The relative advantages and obstacles to a fair trial;
19. The public interest in the case;
20. Whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by the plaintiff;
21. Whether imposition of jury duty is imposed upon a community having no relation to the litigation;
22. The injustice to, and burden on, local courts and taxpayers;
23. The difficulties and inconvenience to the defendant, to the court, and to jurors hearing the case, in attending presentation of testimony by depositions;
24. Availability of the forum claimed to be more appropriate;
25. The other practical considerations that make trial of a case convenient, expeditious and inexpensive.

Id.

process in terms of vexation or oppression by the plaintiff; and (9) the ability to obtain a just judgment.[109]

2. Public Interests

The public interests include court concerns, such as crowded court dockets, delays of domestic trials, and the burden of tax and jury duties upon community members despite the lack of local interest in the outcome of the trial.[110] In addition, there is a great public interest in how the court applies unknown foreign law. Sometimes, national concern for such cases is denied, together with the court's refusal to control and sanction American companies for their illegal behavior abroad as long as the companies complied with American law. Forum shopping as an abuse of the American judicial system must also be taken into account as an important public criteria for *forum non conveniens* dismissals.

G. Effect of the Piper *Decision*

There has been a convergence of venue transfers and *forum non conveniens* dismissals, particularly due to the overlapping subject matter and the comparable balancing test in terms of the "most suitable forum" approach.[111] As the explicit distinction between both procedural devices in *Piper* indicates, however, this convergence was not intended by the courts.[112]

Despite the convergence, the two procedural devices have been applied differently. Because there were no objections against intra-U.S. venue transfers, a very liberal administration and use of venue transfers were possible.[113] *Forum non conveniens* dismissals, on the other hand, were granted mainly as "conditional dismissals," i.e., subject to certain conditions.[114] This practice was necessary to prevent the inherent danger of denying justice when dismissing an action to an alternative forum. Courts may require as conditions for dismissal, for example, that the defendant submit to the jurisdiction and judgment of the alternative forum, waive the statute of

109. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
110. *Id.* at 508-09.
111. Robertson, *supra* note 18, at 408-09.
112. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981).
113. Robertson, *supra* note 18, at 403.
114. *Id.* at 413; *see also* Rhona Shuz, *Controlling Forum-Shopping: The Impact of* MacShannon v. Rockware Glass, Ltd., 35 INT'L & COMP. L.Q. 374, 389-93 (1986).

limitations of the forum, and pay plaintiff's extra expenses incurred from the dismissal of the case.[115]

The use of these conditions adds another reason for a more liberal application of the doctrine. Not only did the courts rely on the force of the conditions imposed, but they also applied only minimum standards in evaluating the adequacy of the alternative forum, and gave little deference to a foreign plaintiff's choice of forum.[116] As a result of the *Gilbert* test and its practical application, a discretionary doctrine has become even more discretionary, and the requirements for *forum non conveniens* dismissals formed the criteria for venue transfers under 28 U.S.C. § 1404(a). This represents the exact development that the Court sought to avoid by clearly distinguishing between venue transfers and *forum non conveniens* dismissals in both *Gilbert* and *Piper*.

The motive and the underlying policy for granting only "conditional dismissals" cannot change the fact that dismissals to foreign fora are statistically and practically regarded as outcome-determinative.[117] Of approximately 180 international *forum non conveniens* dismissals granted by U.S. federal courts from 1947 to 1984, almost none of the dismissed cases were litigated in the alternative forum.[118] Only three cases went through trial and lost, signifying that litigation to the point of judgment is very rare and that a majority of disputes were either settled or were not even pursued in the alternative forum.[119]

Since 1984, federal district courts in the Second, Fifth, and Ninth Circuits have dismissed cases involving foreign plaintiffs on grounds of *forum non conveniens*.[120] The latest misapplication of the doctrine was adjudicated by the U.S. District Court for the Southern District of New York in May of 1986.[121] In *In re Union Carbide Corporate Gas Plant Disaster*, Judge Keenan dismissed a suit brought by Indian citizens against an American corporation on

115. Robertson, *supra* note 18, at 413.

116. David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 223 (1985).

117. Robertson, *supra* note 18, at 409.

118. *Id.* at 419.

119. *Id.*

120. Agyenkwa v. American Motors Corp., 622 F. Supp. 242 (E.D.N.Y. 1985); Syndicate 420 at Lloyd's, London v. Glacier Gen. Assurance, 604 F. Supp. 1443 (E.D. La. 1985); Sherill v. Brinkerhoff Maritime Drilling, 615 F. Supp. 1021 (N.D. Cal. 1985).

121. *In re* Union Carbide Corp. Gas Plant Disaster, Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

the grounds of *forum non conveniens*, illustrating how many courts abuse the doctrine to protect American citizens and companies.[122]

Courts have stretched jurisdiction to the limits of due process through the use of the "minimum contacts" requirements and "long-arm" statutes. The *forum non conveniens* doctrine, as presently applied, also provides an increasingly liberal and extensive device to manipulate the jurisdictional system. The court retains discretion to decide whether a suit is properly brought or whether jurisdiction is abused by forcing a defendant into an "inconvenient" forum. Thus, the question arises regarding the necessity and value of such a degree of discretion, with corresponding uncertainty on both ends of the jurisdictional scale. Excessive jurisdiction seems to favor plaintiffs; however, this often leads to a very liberal application of the doctrine resulting in dismissals. These dismissals tend to favor defendants, especially considering the effect of a dismissal on the continuation of legal controversies in alternative fora.[123] A more restricted but effective system may be more desirable due to economic and efficiency concerns.

The decisions of New York state courts demonstrate the further development of the doctrine. For example, in *Iran v. Pahlavi*,[124] the New York Court of Appeals held that, although existence of a suitable alternative forum was an important factor to be considered in the application of the doctrine, its alleged absence did not bar a dismissal if the plaintiff failed to establish that there was no alternative forum available.

The New York legislature, however, restricted the *forum non conveniens* doctrine because constitutional problems seemed imminent and could not otherwise be resolved. According to Section 5-1401 of the New York General Obligations Law,[125] the parties' choice of law clauses are generally accepted and recognized if, regardless of an appropriate relation to the forum, the value of the contract entered into is at least one million dollars.[126] According to

122. *Id.* WARREN FREEDMAN, FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS 110 (1988). The suit abroad has been settled with the Indian Government for 465 million dollars to compensate the 200,000 injured and the families of the 2,300 killed victims.

123. For the statistical effect, see *supra* notes 108-11 and accompanying text.

124. 467 N.E.2d 245 (N.Y.), *cert. denied*, 469 U.S. 1108 (1985).

125. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1984).

126. *Id.*

Section 5-1401, *forum non conveniens* dismissals are excluded in cases where contracts had been formed.[127]

This statutory exclusion of the *forum non conveniens* doctrine under New York law is of essential value and necessity in the field of international trade, business, and finance, for it provides predictability and allows plaintiffs to calculate the risk of the forum selection. It also clearly demonstrates that, where the doctrine has become more flexible, new objections arise. As a result, the new doctrine is also subject to risks of uncertainty and abuse, characteristics that should not be connected with the application of law.

III. *FORUM NON CONVENIENS* IN THE UNITED KINGDOM

A. The Doctrine of Forum Conveniens

Discretionary power of courts in jurisdictional issues existed in English law only within the so-called *forum conveniens* doctrine, which was employed to establish "assumed jurisdiction."[128] The *forum conveniens* doctrine established jurisdiction over defendants by serving process out of the court's jurisdiction according to R.S.C. Order XI, Rule 1(1).[129] This so-called "leave to serve a writ out of jurisdiction"[130] represents a counterpart to the *forum non conveniens* doctrine, and is comparable to the "long-arm" statutes adopted by most U.S. jurisdictions.

The application of the *forum conveniens* doctrine was based on certain criteria. These criteria, derived from *St. Piérre v. South Am. Stores Ltd.*,[131] include: (1) the nature of the dispute; (2) the legal and practical issues involved; (3) the local knowledge; (4) the availability of witnesses, the evidence expected from them, and the expense of producing them; (5) the applicable law; and (6) the inconvenience and expenses of a foreign defendant being sued in a foreign forum.[132]

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127. Michael S. Oberman, *The Choice of Forum for a Commercial Litigation*, 65 N.Y. ST. B.J., May-June 1993, at 28, 30.

128. G.C. CHESHIRE & P.M. NORTH, PRIVATE INTERNATIONAL LAW 205 (11th ed. 1987).

129. *Id.* at 205. The order grants the court discretion to extend jurisdiction abroad. Order 11, rule 1(1).

130. 1 DICEY & MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 390 (1987).

131. 1 L.J.K.B. 382 (1936).

132. CHESHIRE & NORTH, *supra* note 128, at 206.

These criteria are almost identical to the test announced in *Gilbert*;[133] however, one essential difference exists. Under the *forum conveniens* doctrine, the plaintiff has the burden of proving that his chosen forum is the convenient one.[134] Thus, Order XI was regarded as an exorbitant and excessive use of jurisdictional powers.[135]

B. The Doctrine of Forum Non Conveniens

1. Historical Development: Pre-*Spiliada*[136]

Before 1906, discretionary dismissals were only granted under the *lis alibi pendens* doctrine,[137] and then only if the same controversy was pending in England and abroad and involved the same parties and subject matter.[138] In 1906, a "stay of proceedings" on grounds resembling *forum non conveniens* criteria was granted for the first time.[139] Although it made references to Scottish law[140] and cited two U.S. *forum non conveniens* cases,[141] the decision was based on the "vexatious" and "oppressive" motives of the plaintiff that amounted to an "abuse of process."[142]

Decades later, in 1974, England moved toward a more restrictive *forum non conveniens* doctrine, similar to the early U.S. model.[143] Although *The Atl. Star* court explicitly denied a general recognition of a *forum non conveniens* doctrine,[144] the court pro-

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133. *See supra* notes 41-43 and accompanying text.

134. Amin Rasheed Corp. v. Kuwait Ins. Co., 1984 App. Cas. 50 (appeal taken from Eng.).

135. *Id.* at 72.

136. 1987 App. Cas. 460 (appeal taken from C.A.).

137. 1 DICEY & MORRIS, *supra* note 130, at 396.

138. CHESHIRE & NORTH, *supra* note 128, at 222.

139. Logan v. Bank of Scot., [1906] 1 K.B. 141. The "stay" of action in such English cases has to be regarded as the typical result, notwithstanding the different terminology of "dismissals" in the United States and Scotland; this terminology is the only significant distinction. This analysis, however, only applies to the common practice of U.S. courts of granting only "conditional dismissals."

140. *See id.* at 142.

141. Gardner v. Thomas, 14 Johns. 134 (N.Y. Sup. Ct. 1817); Collard v. Beach, 87 N.Y.S. 884 (A.D. 1904). *See* WAHL, *supra* note 10, at 47.

142. *Logan*, [1906] 1 K.B. at 141.

143. The Atl. Star, 1974 App. Cas. 436 (appeal taken from C.A.).

144. The language of "a" doctrine of *forum non conveniens* is deliberately chosen, as it demonstrates that the doctrine is far from experiencing either uniform application or even uniform criteria for its application.

moted a more liberal interpretation of stay proceedings on "abuse of process" grounds.[145]

In 1978, the court in *MacShannon v. Rockware Glass, Ltd.*[146] launched a *de facto* incorporation of *forum non conveniens* doctrine into English law. The court, however, still did not explicitly acknowledge the *forum non conveniens* doctrine; rather, it achieved this result by applying the "most suitable forum" approach to stays of proceedings.[147] The *MacShannon* decision signified the end of the restricted possibilities to stay an action under the "abuse of process" approach. Another effect of this decision was to allocate the burden of proof between the parties: the plaintiff had the burden to show factors in his favor, *and* the defendant had the burden to show factors against the chosen forum.[148]

Ten years later, in *The Abidin Daver*,[149] the court confirmed the development towards the "most suitable forum" approach and, thus, the *de facto* incorporation of the *forum non conveniens* doctrine into the English law.[150] *The Abidin Daver* decision established the test for discretionary stays as a "balancing of all the relevant factors, private and public, those in favor of a stay and those against it."[151] Lord Diplock stated that the discretion of English courts to stay proceedings could no longer be distinguished from the Scottish doctrine of *forum non conveniens*.[152] The court explained this development as a departure from "judicial chauvinism" towards "judicial comity."[153]

Along with this development came the extension of the discretionary "assumed jurisdiction" pursuant to R.S.C. Order XI, Rule 1(1).[154] Hence, it is not surprising that the reasoning for, and determination of, the *forum conveniens* in *Amin Rasheed Corp. v.*

145. The Atl. Star, 1974 App. Cas. at 454, 468.

146. 1978 App. Cas. 795 (appeal taken from Q.B.).

147. Robertson, *supra* note 18, at 411; CHESHIRE & NORTH, *supra* note 128, at 223.

148. The Atl. Star, 1974 App. Cas. 436 (appeal taken from C.A.).

149. 1984 App. Cas. 398.

150. *Id.*; A.G. Slater, *Forum Non Conveniens: A View from the Shop Floor*, 104 L.Q. REV. 554, 554-75 (1988).

151. The Abidin Daver, 1984 App. Cas. at 419.

152. *Id.* at 411.

153. *Id.* English courts had previously been proud of being called upon by all plaintiffs in all kinds of cases, thus enabling a subtle export of English judicial values.

154. *Cf.* The Abidin Daver, 1984 App. Cas. 398, 411 (appeal taken from C.A.). Order 11, rule 1(1).

Kuwait Ins. Co.[155] were based on almost the same criteria as the stay in *Mac Shannon* with respect to *forum non conveniens*. A standardization and final convergence followed thereafter in the decision of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*[156]

2. Facts and Procedural History of *Spiliada*[157]

In *Spiliada*, the Liberian plaintiffs owned a ship under the name "Spiliada," flying the Liberian flag. The defendants were sulphur exporters from British Columbia. Plaintiffs brought suit in an English court in 1984, claiming damages for corrosion and other damages to the ship caused by the loading of wet sulphur cargo in British Columbia in November 1980.

The plaintiffs obtained "leave to serve a writ out of jurisdiction" according to Order XI, in order to obtain jurisdiction of an English court over the foreign company defendant.[158] The defendant unsuccessfully challenged the court's jurisdiction, and the court declared itself to be the *forum conveniens*.[159] In doing so, the House of Lords held that the determinative criteria for both the *forum conveniens* and the *forum non conveniens* were identical and inseparable.[160]

The English court considered several factors in deciding on the "convenient" forum. First, there was an identical case already pending in an English court.[161] Both ships had the same insurance company, were represented by the same counsel, and involved the same facts.[162] Second, the statute of limitations had already run in British Columbia, rendering a trial in this alternative forum impossible.[163]

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155. 1984 App. Cas. 50, 68 (appeal taken from Eng.). *See also* CHESHIRE & NORTH, *supra* note 128, at 205.

156. 1987 App. Cas. 460 (appeal taken from C.A.).

157. *Id.* at 460-61.

158. *Id.* at 467.

159. *Id.* at 460-61.

160. Spiliada Maritime Corp. v. Cansulex Ltd., 1987 App. Cas. 460 (appeal taken from C.A.).

161. Cambridgeshire, Bibby Bulk Carriers Ltd. v. Cobelfret NV, [1982] Q.B. (unreported decision).

162. *Spiliada*, 1987 App. Cas. at 460-461.

163. *Id.* at 486-87.

3. Significance of *Spiliada*

The *forum non conveniens* doctrine is now expressly acknowledged and incorporated into the English jurisdictional system and is characterized as congruent with the Scottish doctrine.[164] Moreover, the doctrine is applied in both the United Kingdom and the United States as a discretionary procedural device for the determination and exercise of a court's jurisdiction. Thus, these two major representatives of the common law system seem to have achieved a certain synchronization in this field.

Furthermore, *Spiliada* held that the criteria for both "stays" and for Order XI "leaves to serve" are identical.[165] The court confirmed the "most suitable forum" approach for the evaluation of the criteria, in order to guarantee a higher degree of objectiveness.[166] Yet, in exercising this discretion, the trial judge's decision should not be subject to thorough appellate review, because the applicable criteria are "legion" and there is no clear guidance as to how the factors should be weighed.[167] The *Spiliada* decision allows for appellate review of judicial discretion of the trial court in both *forum conveniens* and *forum non conveniens* cases.

The equalization of stays and Order XI leaves, however, cannot be stretched beyond the point of equal criteria because significant differences still remain. One distinction concerns the burden of proof. In motions for a stay, the burden to prove the convenience of the court is mainly on the defendant.[168] On the other hand, in Order XI cases, the burden of proof remains solely with the plaintiff.[169] Moreover, when needed and within the court's discretion, stays can be granted with imposed conditions as "conditional dismissals."[170] Conditions imposed upon the defendant include the payment of additional expenses to the plaintiff, the placement of guarantee deposits or other securities in the alternative forum, waiver of the statute of limitations, and submission to the jurisdiction and judgment of the other court, as well as any other stipulations or further conditions that would have led to a

164. *Cf.* The Abidin Daver, 1984 App. Cas. 398, 411 (appeal taken from C.A.).
165. Slater, *supra* note 150, at 558; CHESHIRE & NORTH, *supra* note 128, at 223.
166. Robertson, *supra* note 18, at 412.
167. Spiliada Maritime Corp. v. Cansulex Ltd., 1987 App. Cas. 460 (appeal taken from C.A.).
168. *Cf.* The Atl. Star, 1974 App. Cas. 436 (appeal taken from C.A.).
169. CHESHIRE & NORTH, *supra* note 128, at 207.
170. *See* discussion *supra* note 114.

legitimate advantage for the plaintiff had the case been tried in the original forum.[171]

Due to their adoption of the "most suitable forum" approach, the English courts have achieved a certain uniformity and standardization in the evaluation of the applicable criteria. The application of the test did not rest solely on convenience considerations. Instead, the test deviated from the original wording of the doctrine and measured the actual appropriateness of the forum.[172] Thus, the "same" doctrine, in the sense of judicial discretion in the exercise of jurisdiction, has developed throughout the decades from *forum non competens* to *forum non conveniens*, and now to *forum non appropriate*.

By developing the "appropriateness" standard, excessive jurisdictions and their restrictions based on convenience considerations could be overcome. Applying an individually flexible test for the determination of the "appropriate forum" might present potential for improvement of the jurisdictional system, a potential which should materialize by future affirmative acts of courts.

4. Reasons for the Development of the Doctrine in England

The English jurisdictional system barely recognizes excessive jurisdictions; the only jurisdiction considered excessive is the "assumed jurisdiction" under Order XI, which, in the form of the *forum conveniens* doctrine, already provides for discretion at the stage of determining jurisdiction.[173] Therefore, there is an essential need for a countervailing discretion to decline excessive jurisdictions.[174]

Because there are no domestic venue transfers under English law,[175] such transfers have no impact on the English *forum non conveniens* doctrine. Yet, the attitude of English courts towards litigation involving foreigners has changed. No longer are courts eager to export the "superior" English judicial system by conducting trials with foreign parties.[176] To the contrary, English courts began to guard against forum shopping by foreign parties by

171. Shuz, *supra* note 114, at 374, 389-93; Robertson, *supra* note 18, at 413.

172. Spiliada Maritime Corp. v. Cansulex Ltd., 1987 App. Cas. 460-61 (appeal taken from C.A.).

173. *See* discussion *supra* part III.A.

174. WAHL, *supra* note 10, at 47.

175. England has no counterpart to 28 U.S.C. § 1404(a).

176. CHESHIRE & NORTH, *supra* note 128, at 233.

following the U.S. example.[177] The courts explained their change of attitude as a departure from "judicial chauvinism" to "judicial comity."[178]

This explanation might seem insufficient and superficial in light of the consequences of integrating a discretionary doctrine like *forum non conveniens* into English law. These consequences range from the loss of certainty, definiteness, and predictability to the potential denial of a plaintiff's access to the courts, particularly because the doctrine employs a very broad basis of criteria—the "most suitable forum" approach. These consequences were also apparent to the judges in the *Spiliada* case. Thus, in the future, they will be guarded against by "conditional stays," which contain similar conditions as those imposed in "conditional dismissals" under the U.S. *forum non conveniens* doctrine.[179]

5. Prognosis

The *Spiliada* decision can only be regarded as a part of a continuous development towards more objective criteria, a development evidenced by the departure from the "convenience test" and the adoption of the "most suitable forum" approach.[180] England must be careful, however, not to import the deficiencies and misapplications of the American model. Thus, ambiguous legal terms, such as the "clearly" or "distinctly" appropriate forum, must not be permitted to result in endless controversies over interpretation.[181] In order to avoid such a result, decisions in *forum non conveniens* cases must be consistent so that future applications of the doctrine will be predictable. This goal seems far out of reach, however, because the "most suitable forum" approach does not give a mathematical formula for determining *forum non conveniens*.[182] Perhaps, the former "abuse of process" approach would have provided for a more restrictive, yet more predictable, rule. On the other hand, legal terms like "vexatious" and "oppressive" are equally ambiguous and encounter similar problems.

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177. *See, e.g.*, The Atl. Star, 1974 App. Cas. 436, 454 (appeal taken from C.A.).

178. The Abidin Daver, 1984 App. Cas. 398 (appeal taken from C.A.); Robertson, *supra* note 18, at 410.

179. For a discussion of "conditional" dismissals, see *supra* note 114.

180. Slater, *supra* note 150, at 573.

181. *Id.* at 574.

182. Robertson, *supra* note 18, at 414; Shuz, *supra* note 114, at 409-11.

Due to the broad spectrum of the criteria and the vast discretion invested in the trial judge, judicial discretion in the United States has become almost unlimited. Because abuse of discretion is difficult to prove, trial court decisions are hardly reviewable. The judge essentially removes the case from appellate review by referring generally and collectively to the broad criteria provided in *Gilbert*.[183]

Appellate review in England is generally more thorough, as it encompasses a review of the clear and distinct balance of the relevant criteria.[184] Nevertheless, English courts have prevented appellate judges' freedom and discretion from growing beyond reasonable limits, as the effect of *Spiliada* has already limited appellate review.[185] Although crowded dockets promise to be a problem for English courts, they might, as in the United States, become a future factor for *forum non conveniens* criteria. Yet, Scottish courts have already rejected the relevancy of such a factor, and it seems likely that English courts will do the same.[186]

English courts, induced by the possibility of imposing conditions on the defendant, should be careful not to apply too liberal an interpretation of the criteria for stays. The courts should strive to avoid the same negative effect as in the United States, where this over-liberal interpretation has led to an assimilation of the bases for "dismissals" and "transfers." This awareness is particularly necessary because of the outcome-determinative effect of stays on the progress of the litigation. Because the English development has been a long, steady, and continuous movement, distinct in that aspect from the U.S. development, English courts can be expected to exercise caution in the application of the doctrine.

The incorporation of the *forum non conveniens* doctrine should be regarded as a fair limitation on the *in personam* jurisdiction and a milestone in improving the jurisdictional system in England.[187] Nevertheless, English courts are aware of the inherent dangers of an arbitrary and over-liberal interpretation of the criteria and a resulting abuse of the doctrine.

183. Robertson, *supra* note 18, at 415.

184. *Id.* at 416.

185. *Id.* at 411; CHESHIRE & NORTH, *supra* note 128, at 223.

186. Robertson, *supra* note 18, at 417.

187. Slater, *supra* note 150, at 575.

IV. Application of the Doctrine to German Plaintiffs in the United States

In the absence of treaties or conventions providing for jurisdictional provisions for German-American disputes, a German plaintiff in the United States is subject to the *lex fori* and, therefore, the procedural doctrine of *forum non conveniens*. After *Piper*, it has been easier for American defendants to escape high damage awards by invoking the doctrine as a defense to jurisdiction of U.S. courts.[188]

If the alternative forum also declines its jurisdiction, the lack of a binding jurisdictional effect of *forum non conveniens* dismissals on the alternative forum could lead to a denial of justice. On the other hand, the practice of granting "conditional dismissals"[189] reduces the risk of these "negative competence conflicts."[190] In Germany, there exists the remote possibility of an emergency jurisdiction, which a minority of judges promote for extraordinary cases.[191]

Additionally, in the area of aviation law, there is much controversy about the applicability of the *forum non conveniens* doctrine within the scope of Article 28 of the Warsaw Convention.[192] Article 28(I) gives the plaintiff a limited but exclusive choice between, at the most, four available jurisdictions. Nevertheless, state courts have refused plaintiffs this choice by invoking the *forum non conveniens* doctrine under Article 28(II), which is governed by the *lex fori* and, thus, unaffected by the plaintiff's Article 28(I) choice.

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188. Marilyn Adams, *Lawsuit Arising from Cruise-Ship Fire Is Dismissed*, Miami Herald, June 5, 1993, at C1. The latest "victims" of the *forum non conveniens* doctrine in the United States are the 300 surviving passengers of a 1990 fire on the cruise ship "Scandinavian Star" and their relatives, most of whom were Scandinavian. They filed a 100 million dollar suit against Lloyd's Register of Shipping in Florida, alleging that Lloyd's Florida inspectors negligently certified the ship's safety. Judge Rosenberg dismissed the case on *forum non conveniens* grounds because "virtually all of the relevant witnesses and evidence are in Scandanavia, the casualty occurred in Scandanavia, [and] the plaintiffs are almost all Scandanavian." *Id.*

189. *See* discussion *supra* part II.

190. *See* discussion *infra* part VI.C.4.

191. Graf, Die Internationale Verbundszuständigkeit 93, 94 (1983).

192. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934), note following 49 U.S.C. App. § 1502 [hereinafter Warsaw Convention]; People *ex rel.* Compagnie Nationale Air Fr. v. Giliberto, 383 N.E.2d 977 (Ill. 1978). Further examination of the very idiosyncratic aviation law domain is beyond the scope of this Article and, consequently, is omitted.

V. Application of the Doctrine to German Litigants in England

After the *Spiliada* decision, the situation for German parties in England should actually be the same as in German-American cases. Under certain circumstances, however, the Hague Convention on Civil Jurisdiction and Judgments of 1968 applies to German-English jurisdictional matters.[193] This Convention has been incorporated into the law of Great Britain by virtue of the 1982 Act.[194]

A. Scope of the Hague Convention

According to Article 1(I)(2), the Hague Convention only applies to civil and commercial matters, and further excludes tax and customs matters.[195] Article 1(II) lists additional exceptions to the general application of the Convention's Article 1(I)(1).

In order to determine the application of *forum non conveniens*, it is necessary to examine the scope and applicability of the Convention to cases against German litigants in England after implementation of the Convention under the 1982 Act. The major issue concerns the coexistence of the provisions of the Convention and the generally-accepted British doctrine of *forum non conveniens* since *Spiliada*.

B. The Civil Jurisdiction and Judgments Act of 1982

The 1982 Act vested authority in the Convention to set forth jurisdictional provisions. Pursuant to this authorization, the Convention excluded jurisdictions based upon a "transient rule" and upon the *arrestment ad fundandam* jurisdiction, while it allowed exclusive jurisdictions and provided for an affirmative duty to dismiss cases of *lis alibi pendens*.[196]

Section 49 of the 1982 Act contains a proviso in favor of the *forum non conveniens* doctrine, the application of which shall only

193. Hague Convention on Civil Jurisdiction and Judgments of 1968 (as amended 1978) [hereinafter Convention].

194. Civil Jurisdiction and Judgments Act of 1982 (effective Jan. 1, 1983) (Eng.) [hereinafter 1982 Act]; Peter Schlosser, *Report to the Convention*, [1979] OJC 59/71 paras. 78-79; *see generally* Lawrence Collins, The Civil Jurisdiction and Judgments Act 1982 (1983).

195. Schlosser, *supra* note 194, at 82; Paul Jenard, *Report to the Convention*, [1979] OJC 59/1 paras. 8-9.

196. Collins, *supra* note 194, at 45; Robertson, *supra* note 18, at 427.

be permitted "as long as [it is] not inconsistent with the Convention."[197] Some authorities interpret this proviso as evidence that the signatories originally intended to permit application of the doctrine in cases of: (1) "abuse of process"; (2) choice of forum agreements between parties; and (3) "*lis alibi pendens*" in non-contracting countries, for these latter cases are not even covered by the Convention.[198]

C. *Application of the Doctrine Within the Scope of the Convention*

1. Supporters

a. General Application

After *Spiliada*, the *forum non conveniens* doctrine became applicable as *lex fori* where the Convention does not govern the dispute.[199] For example, in domestic relations, which are excluded from the Convention under Article 1(II)(1), determination of jurisdictional issues have been made discretionary in England. These discretionary decisions employ the same criteria as those established by *Spiliada* for *forum conveniens* and *forum non conveniens* cases.[200] Reference to this parallel development was recently made in *De Dampiérre v. De Dampiérre*,[201] a decision concerning *forum non conveniens* dismissals in domestic relations cases.

b. Application Within the Scope of the Convention

A literal interpretation of Section 49 of the 1982 Act supports a general application of the doctrine.[202] The Act was promulgated in favor of *forum non conveniens*, and it explicitly subjects the scope of the Convention in the United Kingdom to the provisions of the 1982 Act: "that nothing in this Act is to prevent any court of the U.K. from staying any proceedings on the ground of *forum non conveniens*, where to do so is not inconsistent with the 1968 Convention."[203]

197. COLLINS, *supra* note 194, at 46.
198. *Id.*; TREVOR C. HARTLEY, CIVIL JURISDICTION AND JUDGMENTS 79, 80 (1984).
199. 1 DICEY & MORRIS, *supra* note 130, at 392; HARTLEY, *supra* note 198, at 78.
200. 1 DICEY & MORRIS, *supra* note 130, at 139-40.
201. 1988 App. Cas. 92 (appeal taken from C.A.).
202. 1982 Act, *supra* note 194, § 49.
203. *Id.*

Although the 1982 Act was promulgated before judicial recognition of the doctrine in *Spiliada*, it strongly limits the doctrine by referring to and requiring consistency with the original 1968 Convention. Yet, all cases arising under the Convention would, according to the *Spiliada* majority opinion, be inconsistent with the Convention's structured and clearly distinctive jurisdictional system, thus prohibiting the application of the *forum non conveniens* doctrine outright.[204] Nevertheless, this result would lead to the practical irrelevancy of the doctrine within the scope of the Convention, and Europe in general, and leave its application only to *lex fori* situations outside the scope of the Convention. Thus, outright preclusion of the doctrine could not have been the intent of the signatories when ratifying the Convention.

Moreover, the theoretical proviso of Section 49, covering the doctrine before its express general approval in *Spiliada*, is significant for not creating an obstacle to *forum non conveniens* in the United Kingdom. The doctrine, under Section 49, is limited to preventing abuse of process and *forum non conveniens* considerations despite the applicability of the Convention. This interpretation of the doctrine was approved in *Smith Kline & French Lab. Ltd. v. Bloch*,[205] where the court, applying the "abuse of process" approach, held that discretionary stays must be possible in cases involving "oppression" and "vexation," even within the Convention, in order to prevent undue hardship and injustice.[206]

The *Smith Kline* case closed the circle on the doctrine's long history in Great Britain. Great Britain initially followed the strict "abuse of process" approach, then switched to the "most suitable forum" approach. When the courts were restricted again under the Convention, they returned to the strict "abuse of process" approach, requiring "vexation" or "oppression" for a stay.

Some argue, however, that the doctrine should govern in cases not explicitly covered by the Convention.[207] These include cases involving choice of forum clauses, *lis alibi pendens* in favor of contracting countries, or real property matters in non-contracting countries.[208] Defendants attempting to escape the scope of the

204. CHESHIRE & NORTH, *supra* note 128, at 252; Schlosser, *supra* note 194, at 97 n.78.

205. [1983] 2 All E.R. 72.

206. COLLINS, *supra* note 194, at 46; Adrian Briggs, *Which Foreign Judgments Should We Recognize Today?*, 36 INT'L & COMP. L.Q. 240, 246-47 (1987).

207. COLLINS, *supra* note 194, at 79.

208. HARTLEY, *supra* note 198, at 78.

Convention create a risk of "negative competence conflicts "because there are no binding dismissals or stays outside the Convention.[209] Several stays might leave the plaintiff unprotected and would, therefore, lead to a denial of justice. The plaintiff, however, is protected from unjust discretionary stays outside of the Convention, as such stays will only be granted upon proof by clear preponderance in favor of the alternative forum. This burden of proof is placed upon defendants mainly to reach just results.[210]

2. Rejection of the Doctrine

a. Exclusiveness of the Convention

There is no practical relevancy to the application of Section 49 because the doctrine always results in an inconsistency with the Convention.[211] Opponents of the doctrine argue that there is neither an opportunity nor a need for a doctrine of *forum non conveniens* above and beyond the parameters of the Convention, as the Convention follows strict jurisdictional rules that leave no room for discretion. Their arguments rely upon the reports of Schlosser and Jenard concerning the interpretation and construction of both the original 1968 Convention and its 1978 amendment.[212]

Moreover, the provisions of the Convention are generally interpreted as obligatory, mandatory, and exclusive, in order to provide predictability, expediency, and efficiency in international jurisdictional matters.[213] Even English authorities emphasize these provisions of the Convention as necessary to facilitate the recognition of judgments based on reasonable and concrete jurisdictions.[214]

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209. *See* discussion *supra* part IV.

210. *Id.*

211. P.A. Stone, *The Civil Jurisdiction and Judgments Act 1982: Some Comments*, 32 INT'L & COMP. L.Q. 477, 496 (1983); CHESHIRE & NORTH, *supra* note 128, at 252; 1 DICEY & MORRIS, *supra* note 130, at 398.

212. Stone, *supra* note 211, at 496; CHESHIRE & NORTH, *supra* note 128, at 252; 1 DICEY & MORRIS, *supra* note 130, at 398; Schlosser, *supra* note 194, at 97 nn.78-80.

213. Schlosser, *supra* note 194, at 97 n.77.

214. PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 1244 (1987).

b. Historical, Grammatical, and Theological Reasons

The *forum non conveniens* doctrine was both alien and disagreeable to the civil law jurists involved in drafting the Convention because the civil law provides strict jurisdictional rules.[215] Thus, integration of such a doctrine into the Convention was never contemplated.[216] In fact, the General Counsel to the European High Court, Capotorti, expressly disapproved the doctrine in two decisions in 1976 by rejecting the use of discretion in determining jurisdiction.[217]

The text of the Convention does not authorize any discretion in jurisdictional matters. To the contrary, it provides for an affirmative duty to dismiss *lis alibi pendens* cases pursuant to Article 21(I), thus not leaving any room for judicial discretion. If the Convention is interpreted as exclusively governing its subject matters, any kind of discretionary power would have to be derived from a positive statement of the Convention. The Convention, however, contains no such provision. Indeed, the Convention is designed to provide for clear and undisputed jurisdictions, to prevent controversies regarding the exercise of discretion, and, in the extreme, to prevent trials on the sole issue of whether a party can go to a particular court or not.[218] Furthermore, considerations of convenience and appropriateness have already been included in the Convention, if only in standardized form.[219] If this official interpretation by Schlosser and Jenard is considered to be binding, no room nor need remains for further discretionary considerations on a case-by-case basis in terms of a *forum non conveniens* doctrine.

3. Summary

An analysis of the Convention and its purpose reveals that the doctrine of *forum non conveniens* was intended neither to be used within the scope of the Convention nor to serve as an instrument of judicial discretion. Moreover, application of the doctrine within the Convention would only question the predictability and certainty of its jurisdictional rules. Therefore, the doctrine applies to

215. CHESHIRE & NORTH, *supra* note 128, at 328.

216. DASHWOOD ET AL., *supra* note 9, at 425 nn.76-78.

217. Case 12/76, Tessili v. Dunlop, 1976 E.C.R. 1473, 1 C.M.L.R. 26 (1977); Case 42/76, De Wolf v. Cox, 1976 E.C.R. 1759, 2 C.M.L.R. 43 (1977).

218. D. LASOK & P.A. STONE, CONFLICT OF LAWS IN THE E.E.C. 280-81 (1987).

219. CHESHIRE & NORTH, *supra* note 128, at 327.

cases involving British litigants only. Finally, there are no objections against the Convention's jurisdictional system. Consequently, there is no need to change the concept or integrate an unknown doctrine viewed as a "curse" to most continental European lawyers.[220]

Nevertheless, the doctrine is not banned completely from Europe. Section 49 of the 1982 Act allows its application as *lex fori* in all cases consistent with the Convention or outside of its scope. This application frequently involves family law disputes. The Domicile and Matrimonial Proceedings Act of 1973[221] provided explicitly for discretionary powers of the courts to stay proceedings based on *forum non conveniens* considerations. The Act extended jurisdiction in favor of the formerly disadvantaged spouses, yet also empowered the courts to limit this jurisdiction, again, by virtue of discretionary stays under *forum non conveniens* criteria.[222]

VI. *FORUM NON CONVENIENS* IN GERMAN CIVIL PROCEDURE

A. General Considerations

No express provisions under German law provide for a *forum non conveniens* doctrine. Nevertheless, some legal scholars have asserted, since the 1970s, that a *forum non conveniens* doctrine was expanding to become an established legal doctrine in certain areas of the law, e.g., in matters of "non-contentious jurisdiction" (*Freiwillige Gerichtsbarkeit*).[223]

As already determined, however, at least within the scope of the Convention, such a doctrine would virtually be barred by the exclusive provisions of the Convention. The Federal Republic of Germany has not even promulgated a proviso similar to the one included by the United Kingdom in Section 49 of the 1982 Act.

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220. Robertson, *supra* note 18, at 426 n.197.

221. Paul R. Beaumont, *Conflicts of Jurisdiction in Divorce Cases—Forum Non Conveniens*, 36 INT'L & COMP. L.Q. 116, 120-21 (1987).

222. *Id.*; *Family Law: Report on Jurisdiction in Matrimonial Cases*, 48 L. COMM. 75 (1972).

223. Erik Jayme, *Zur Übernahme der Lehre vom "Forum Non Conveniens" in das Deutsche Internationale Verfahrensrecht*, 1975 STAZ 91. Such matters relate to guardianships, domestic relations, probate, and adoption.

B. Support for the Doctrine

1. German Case Law

There is a tendency for German courts to limit the jurisdiction of domestic courts, within reason, and consider the objective interests of the parties if an alternative forum is closer to the case than the domestic court.[224] Some courts have considered the doctrine of *perpetuatio fori*, or the continuation of a once-established jurisdiction, when applying *forum non conveniens* criteria. Although one court's consideration of these criteria resulted in a dismissal of the action[225] and the other court's evaluation led to a perpetuation of its jurisdiction,[226] both considered efficiency and expediency as the main factors.

A court may decline jurisdiction for failure to show "legitimate interest to take legal action," which is equivalent to the standing doctrine in the United States.[227] The Bavarian Supreme Court based a decision to decline jurisdiction on the availability of a less expensive trial in the alternative forum, the interests of the parties, and the unrestricted right of the defendant to defend himself in the alternative forum.[228] Similar decisions followed, although they never expressly referred to the *forum non conveniens* doctrine.[229]

Eventually, two courts expressly applied the doctrine of *forum non conveniens*. In 1975, the LG Hamburg demanded a "sufficient domestic element" as a jurisdictional requirement for upholding the choice of a domestic forum by agreement between the parties. Consistent with U.S. courts, the German court treated these forum choices as a mere presumption of the forum's appropriateness.[230] In 1982, the OLG Frankfurt referred explicitly to the *forum non conveniens* doctrine to decline a *perpetuatio fori* in a case of non-

224. Erik Jayme, 1972 FAMRZ 507, 508.

225. KG 1959 IPRspr. 1958/59 No. 209; 1959 NJW 130.

226. OLG Hamburg IPRspr. 1945/49 No. 46; 1950 NJW 509.

227. BLACK'S LAW DICTIONARY 731 (5th abr. ed. 1983).

228. OLG Nürnberg IPRspr. 1960/61 No. 207; 1961 AWD 18.

229. OLG Bamberg, 1982 IPRax 28; OLG Frankfurt, 1986 IPRax 284; AG Würzburg, 1985 IPRax 111; AG Eggenfelden, 1982 IPRax 78.

230. LG Hamburg, 1976 RIW 228; 1976 WM 985. AG ("Amtsgericht") stands for the trial courts in the respective districts; LG ("Landgericht") represents the first appellate level; OLG ("Oberlandesgericht") represents the second appellate level. Additionally, there are two federal final courts of appeal: the BGH ("Bundesgerichtshof") for non-constitutional matters, and the BVerfG ("Bundesverfassungsgericht") for constitutional matters.

contentious matter jurisdiction.[231] In this case, the parties involved had moved away from Germany and had demonstrated complete lack of interest in the case.[232] The court held that, in proceedings of non-contentious matters, it could not apply the *perpetuatio fori* for international jurisdictions without restrictions.[233] Thus, it considered factors of suitability and expediency, and declined jurisdiction in order to correct an absurd jurisdiction resulting from the rigid principle of the *perpetuatio fori* and to reach a reasonable arrangement of custody rights.[234] Prior to this decision, such considerations were only made to determine the lack of jurisdiction in divorce cases under the now abolished Section 606(b) of the Civil Procedure Statute.[235] Although some courts have adopted factors encompassed by the *forum non conveniens* doctrine, no common principle or practice has been established.

2. German Civil Procedure

Certain sections of the Civil Procedure Statute ("ZPO"), the Non-Contentious Matters Statute ("FGG"), and the Hague Convention concerning the jurisdiction of authorities and the law applicable with respect to the protection of minors ("MSA") provide for limited judicial discretion in jurisdictional matters.

a. Sections 650(I) and 651 of the ZPO

The procedure for invoking judicial discretion in jurisdictional matters is virtually identical to requirements for venue transfers under 28 U.S.C. § 1404(a) when applied to the specific guardianship scenario. The courts, however, only weigh a few relevant factors. In proceedings for the appointment of a guardian for an incompetent, the initiating court may, pursuant to Sections 650(I) and 651 of the ZPO, transfer the proceedings to the District Court (*Amtsgericht*) where the alleged incompetent resides, if this is in accordance with the interests of the parties.[236] This enables a court

231. OLG Frankfurt, 1983 IPRax 294.

232. Peter Schlosser, 1983 IPRax 286.

233. *Id.*; FIRSCHING, EINFÜHRUNG IN DAS IPR § 19(1a)(aa) (3d ed. 1987); KLINKHARDT, 7 MÜNCHENER KOMMENTAR ZUM BGB art. 22 EGBGB n.205 (1983).

234. Claude Blum, *Forum non conveniens*, 43 ZÜRICHER STUDIEN ZUM VERFAHRENSRECHT 170 (1971).

235. Jayme, *supra* note 223, at 93.

236. B. WIECZOREK & G.F. ROESSLER, 3 ZPO-KOMMENTAR § 650(A)(I) (2d ed. 1980).

to disregard its original jurisdiction based on domicile under Section 648 of the ZPO, and to exercise discretion to transfer the case in the interests of the alleged incompetent and the immediacy of taking evidence.[237] The transferee court obtains jurisdiction immediately with the issuance of the transfer order, thus leaving no jurisdictional gaps or lack of legal protection.[238] The same procedure applies under Section 651 of the ZPO if the case is transferred again to a third court.

b. Sections 47(I) and 47(II) of the FGG

According to Section 47(I) of the FGG, a court may decide not to appoint a guardian for an incompetent if this type of guardianship already exists in the alternative forum and meets the best interests of the ward.[239] The ward's lack of interest to proceed in this forum is presumed if the ward has either domicile or residence in a foreign alternative forum.[240] To evaluate the circumstances to determine the best interests of the ward, the court exercises discretion to determine the jurisdiction.[241]

Under Section 47(II) of the FGG, the court has discretion to transfer its control over guardianships to an alternative forum after it weighs the effectiveness and immediacy of evidence and the ward's best interests.[242] The proximity and immediacy of evidence is a significant factor because access to the evidence and witnesses is outcome-determinative and, consequently, in the best interests of the ward.[243]

With respect to non-contentious matters in general, several legal writers have formulated and promoted a doctrine giving the court discretion to decline jurisdiction over international litigants if an alternative forum has jurisdiction to decide the matter on the merits and bear a closer relation to the case and to the parties.[244]

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237. GRAF, *supra* note 191, at 76; BGHZ 10, 316; RGZ 148, 127.

238. WIECZOREK & ROESSLER, *supra* note 236, § 650(B)(I).

239. KEIDEL ET AL., FREIWILLIGE GERICHTSBARKEIT § 47 n.4 (14th ed. 1992).

240. GRAF, *supra* note 191, at 77.

241. Such judicial discretion is also approved under the Swiss statutes governing guardianship cases. *See* BGE 86 II 323; BGE 82 II 132.

242. JOCHEN SCHRÖDER, DIE INTERNATIONALE ZUSTÄNDIGKEIT 495 (1971); KEIDEL ET AL., *supra* note 239, § 47 n.1.

243. The same rationale has been applied under Austrian law, which has a similar provision in Sections 33 and 111 of Civil Jurisdiction. SCHRÖDER, *supra* note 242, at 495.

244. P. Dopffel & K. Siehr, *Thesen zur Reform des Internationalen Privat—und Verfahrensrechts*, 44 RABELSZ 344, 353, 365 (1980); 1 KROPHOLLER, *supra* note 106, at 206.

c. Further Discretionary Provisions of the ZPO and Other Statutes

In trials involving several disputed claims and parties, Section 36(3) of the ZPO permits a court that is superior to the one of original jurisdiction to choose between several available jurisdictions and to select the one with the most appropriate relationship to the case.[245] The court has discretion to assess the disputed value, which is significant for: (1) the determination of the appropriate court of first instance under Section 21(1) of the GVG; and (2) the determination of the pertinency of counter-claims under Sections 33 and 263 of the ZPO.[246] Moreover, in a system of statutorily fixed attorney's fees awarded to the prevailing party, the discretion of the trial judge over the disputed value also directly affects the assessment of attorney's fees.

Pursuant to Section 24(1) of the Unfair Competition Statute ("UWG"), the international jurisdiction in antitrust actions lies with the forum of the defendant's principal place of business.[247] Yet, if this place cannot easily be determined, further circumstances must be taken into account, giving the court discretion to decide the jurisdictional issue.[248] Finally, Sections 296(I), 296(II), 444, 527, 528, and 628(I) of the ZPO contain further examples that allow for a certain degree of judicial discretion. They affect a court's jurisdiction pursuant to the *favor actoris*, a principle that permits the plaintiff to select the forum. The application of the above provisions results in the exercise of actual judicial discretion. This discretion, however, will not allow a court to dismiss a case based on considerations of convenience.

245. RGZ 36, 347-48. This procedure resembles venue transfers in the U.S. court system under § 1404(a), yet an important distinction from *forum non conveniens* dismissals remains: only a selection between several available jurisdictions within the tight German procedural net takes place, rather than a complete dismissal.

246. GRAF, *supra* note 191, at 78; *see* ZPO §§ 3, 286, 287.

247. UNLAUTERERWETTBEWERBSGESETZ [UNFAIR COMPETITION STATUTE] [UWG] § 24(1) (F.R.G.).

248. RGZ 44, 87, 129, 361; SCHRÖDER, *supra* note 242, at 495.

d. Historical and Other European Examples of Judicial Discretion

Both the counterclaim in Section 17(3) of the Prussian Civil Laws[249] and the Saxonian law of transfers by delegations of superior courts provide for judicial discretion in determining jurisdictional questions. The criteria used by these courts include the suitability of the forum, i.e., proximity of the evidence, costs, and expediency of the trial.[250] These criteria are equally relevant in Austrian guardianship cases pursuant to Sections 31 and 111(I) of the Austrian Civil Laws.[251] France and Switzerland are also familiar with the procedural device of dismissals based on considerations resembling the *forum non conveniens* doctrine.[252]

The former Swiss International Private Law ("IPR")[253] expressly provided for a *forum non conveniens* clause in Article 8d(III) of the NAG.[254] The clause allowed a court to decline its international jurisdiction in cases concerning parent-child relations when there was an overwhelming connection with another forum that did not acknowledge the jurisdiction of the current forum.[255] Judicial discretion in this area, however, was abolished by the new Swiss IPR. Accordingly, the application of the Swiss doctrine of *forum non conveniens* is now limited to a choice of forum clauses to be applied only where the relationship between the domestic forum and the litigation is too attenuated.[256] Nevertheless, there are many who support the general applicability of the doctrine in Swiss law providing that the litigation should and actually could continue in an alternative forum.[257]

With respect to multilateral agreements, Article 4(I) of the MSA provides for some judicial discretion. Under Article 4(I), a

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249. ALLEGEMENE GESETZ ORDNUNG [PRUSSIAN CIVIL LAWS] [AGO] § 17(3) (Prussia).

250. SCHRÖDER, *supra* note 242, at 491-92.

251. *Id.* at 495; JURISDIKTIONSNORM GESETZ [CIVIL JURISDICTION] [JN] §§ 31, 111(I) (Aus.).

252. SCHRÖDER, *supra* note 242, at 496 nn.2140-42.

253. INTERNATIONALES PRIVATRECHT [INTERNATIONAL PRIVATE LAW] [IPR] (Switz.).

254. NIEDERGELASSENEN UND AUFENTHALTER [SWISS CIVIL CODE] [NAG] art. 8d(III) (Switz.).

255. MAX KELLER & KURT SIEHR, ALLGEMEINE LEHREN DES IPR § 45 III 1 (1986).

256. *See* IPR art. 5III (Switz.).

257. KURT SIEHR, FREIBURGER KOLLOQUIUM ÜBER DEN SCHWEIZERISCHEN ENTWURF ZU EINEM BUNDESGESETZ ÜBER DAS IPR 86 (Zürich 1979).

court has the power to yield its jurisdictional powers to another court where to do so would be in the best interest of the minor. MSA Article 1(I), however, confers original jurisdiction on the forum of ordinary residence.[258]

Although traces of judicial discretion can certainly be identified within the German civil procedure system, the discretion is limited in both German case law and existing discretionary statutory provisions. Further traces of judicial discretion in the European environment facilitate arguments by legal scholars in favor of a general *forum non conveniens* doctrine. Yet, although these arguments are potentially justifiable, as a general rule, the doctrine is only applied in Great Britain.

3. German Legal Writers

Some writers of German legal literature propose the adoption of the *forum non conveniens* doctrine. Some argue that the idea of *forum non conveniens* is already embedded in German civil procedure.[259] Wilhelm Wengler was the first to suggest the incorporation of *forum non conveniens* into the German system of civil procedure in 1959. He characterized the doctrine as a sound and practical instrument.[260]

Eventually, the decision concerning a general acceptance of a *forum non conveniens* doctrine will depend on the balancing test that the German Federal Constitutional Court ("BVerfG") has applied to procedural and, in particular, jurisdictional rules.[261] According to this test, a balance must be struck between the certainty of the law and the predetermination of the individual judge on one hand, and case-specific justice on the other.[262]

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258. MINDERJÄHRIGENSCHUTZABKOMMEN (discussing the Hague Convention concerning the jurisdiction of authorities and the law applicable with respect to the protection of minors [MSA]); 1 KROPHOLLER, *supra* note 106, at 208 n.438.

259. SCHRÖDER, *supra* note 242, at 486; Jayme, *supra* note 223, at 22; WAHL, *supra* note 10, at 114-15.

260. Wilhelm Wengler, *Zur Adoption Deutscher Kinder durch Amerikanische Staatsangehörige*, 1959 NJW 127, 130.

261. BUNDESVERFASSUNGSGERICHT [FEDERAL CONSTITUTIONAL COURT] [BVerfG] (F.R.G.).

262. BVerfGE 9, 223.

a. Justice in the Individual Case

A strong argument in favor of individual justice is derived from the effect that the selection of the forum has on the outcome of the case, as the initial selection determines the applicable law.[263] Furthermore, for convenience, trials are held in the forum most closely related to the case because this facilitates the availability of evidence and witnesses.[264] Where overwhelming connections with an alternative forum exist, there is a need to ease rigid German jurisdictional rules in the interests of justice.[265] Therefore, criteria such as the applicable law and the proximity of evidence should already be considered at the jurisdictional stage.[266]

Proponents of the doctrine further argue that the typical considerations of suitableness and appropriateness, which the doctrine's opponents support as an inherent part of the German civil procedure system, are insufficient to guarantee individual justice.[267] The individual flexibility provided by the doctrine promotes a counterbalance to the increased liberalization of jurisdictional requirements in German civil procedure. Currently, through Sections 23 and 35 of the ZPO, the plaintiff exclusively selects the jurisdiction.[268]

The increase in liberal jurisdictions, which led to an expansion of the *forum non conveniens* doctrine in the United States, contradicts the notion that standards of appropriateness have already been integrated into the ZPO and could lead to inappropriate jurisdictions and unjust trials.[269] Such a result would be adverse to obtaining the "right result on the basis of a just trial."[270]

With this goal in mind, some courts have exercised discretion and declined inappropriate jurisdictions in order to prevent undue hardship in particular cases.[271] The need to decline jurisdiction for specific cases, such as adoption matters, has been the basis of considerable support in German legal literature for the application of

263. Blum, *supra* note 234, at 200; v. Hoffmann, 1982 IPRAX 222; WAHL, *supra* note 10, at 30.

264. SCHRÖDER, *supra* note 242, at 497-98.

265. ERIK JAYME, KOLLISIONSRECHT UND BANKGESCHÄFTE 29-30 (1977).

266. Jayme, 1984 IPRAX 303.

267. 1 KROPHOLLER, *supra* note 106, at 208.

268. Blum, *supra* note 234, at 205.

269. 1 KROPHOLLER, *supra* note 106, at 204.

270. WAHL, *supra* note 10, at 124.

271. *See* cases cited *supra* part VI.B.1.

the doctrine of *forum non conveniens* in those matters.[272] The factors considered include the reasonable interests of the parties, the proximity of the forum to evidence, witnesses, and facts, and a general concern for making evidence as obtainable as possible while avoiding potential injustice.[273] In adoption matters, further emphasis is given to the stability of family relations outside of Germany and to the requirement of an international "legitimate interest to take legal action."[274] Overall, it can be argued that *forum non conveniens* considerations are actually applied within the doctrine of the required "legitimate interest to take legal action." Thus, the *forum non conveniens* doctrine already exists *sub nomine* of the doctrine of "lacking legitimate interest to take legal action."[275] While the doctrine of "legitimate interest to take legal action" can be compared to the old doctrine of *forum competens*, its inverse application in the form of "lacking legitimate interest to take legal action" resembles the doctrine of *forum non conveniens*.

b. The "Legitimate Interest To Take Legal Action" (Rechtsschutzinteresse)

In German civil procedure, the "legitimate interest to take legal action" is a commonly acknowledged procedural prerequisite, the lack of which leads to a dismissal for nonsuit.[276] This "legitimate interest to take legal action" presupposes both a valid cause and a good-faith intention on the part of the plaintiff to qualify for procedural and legal protection, and takes into account considerations such as expediency and effectiveness.[277]

Legal protection is only granted within the limits tolerated by society and community. An "abuse of process" results in the loss of such protection and in the denial of the plaintiff's "legitimate

272. Jayme, *supra* note 223, at 94; WAHL, *supra* note 10, at 47; SCHRÖDER, *supra* note 242, at 486; Wengler, *supra* note 260, at 130.

273. SCHRÖDER, *supra* note 242, at 497-98.

274. Jayme, *supra* note 223, at 92.

275. KLINKHARDT, *supra* note 233, art. 22 EGBGB n.202; OLG Zweibrücken, 1973 FamRZ 479; Jayme, 1984 IPRAX 124; HELDRICH PALANDT, KOMMENTAR ZUM BGB art. 22 EGBGB n.4(c)(bb) (51st ed. 1992).

276. ROSENBERG & SCHWAB, ZIVILPROZESSRECHT § 93 IV (14th ed. 1986); THOMAS & PUTZO, ZPO-KOMMENTAR pre § 253m (18th ed. 1993); HARTMANN ET AL., ZPO-KOMMENTAR AT GRUNDZ. § 253(5A) (50th ed. 1992).

277. ROSENBERG & SCHWAB, *supra* note 276, § 93 IV(1).

interest to take legal action."[278] When evaluating the plaintiff's "legitimate interest to take legal action," courts refer to the purpose of the judicial process and thereby engage in a test that resembles the "abuse of process" approach of early Anglo-American law.

It is sometimes inferred from these parallels that both the doctrine of "lacking legitimate interest to take legal action" and the doctrine of *forum non conveniens* are actually identical doctrines, either of which could be applied to defeat international jurisdictions.[279] Suggested criteria for such a doctrine, regardless of its name, include: the private interests of the parties, the effectiveness and efficiency of the trial, the applicable law, and problems arising out of the compliance with specific procedural rules under the foreign applicable law.[280] For example, these specific procedural rules might recommend dismissal of the action if an alternative forum could achieve a more appropriate investigation and adjudication of the particular case.[281]

c. *Certainty and Predictability of the Law and Predetermination of the Respective Trial Judge*

The introduction of a general and non-rigid doctrine such as *forum non conveniens* always carries the risk of instability and uncertainty. Thus, concrete guidelines are necessary to guarantee certainty and predictability, which are the essential elements of German civil procedure. In order to meet this standard, German courts could incorporate criteria established throughout the years by U.S. courts to ensure reasonably predictable results.[282] This potential resort to established criteria presents a defense to criticisms that the doctrine of "lacking legitimate interest to take legal action" is just an all-purpose fall-back doctrine, leading to increased unpredictability and uncertainty of the law.[283]

Constitutional objections arise out of Article 101(I)(2) of the Federal Constitution,[284] which requires the statutory predetermina-

278. BGH, 1976 GRUR 257; 1 EKKEHARD SCHUMANN ET AL., KOMMENTAR ZUR ZPO pre § 253 n.118 (20th ed. 1984).

279. *See generally* PALANDT, *supra* note 275.

280. Jayme, *supra* note 223, at 326.

281. 2 A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 40 (1973).

282. Jayme, *supra* note 223, at 93; WAHL, *supra* note 10, at 114.

283. 1 SCHUMANN ET AL., *supra* note 278, at intro. n.760; GRAF, *supra* note 191, at 79.

284. GRUNDGESETZ [FEDERAL CONSTITUTION] [GG] art. 101(I)(2) (F.R.G.).

tion of any prospective trial judge. The BVerfG, however, has generally permitted indefinite legal terms, as long as the terms provide a sufficient degree of predictability to the specific trial judge.[285] The criteria applied by U.S. courts could provide a sufficient basis for determining the degree of certainty and predictability with respect to predetermining the prospective trial judge.

It is also argued that a doctrine that satisfies constitutional due process standards in one Western state could not be unconstitutional in a similar Western state, unless a surprising difference in values and legal concepts is revealed.[286] Moreover, judicial discretion in the United States is not wholly unlimited, so that reasonable exercise of judicial discretion does not amount to judicial manipulation in disguise.[287]

d. Additional Considerations

The effectiveness and efficiency of the administration of the law and the concentration of connected trials in a single forum are additional criteria that could be taken into account. For example, it might be reasonable to try a case in its entirety, with all the related parties or issues, in front of a single tribunal. The *Spiliada* court considered such an efficiency argument, and elected not to dismiss the action to a foreign alternative forum when it would result in splitting the parties and issues.[288] The *forum non conveniens* doctrine, however, could provide an unintended extension of jurisdictions, as it has in the United States, by restricting the abuse of extensive jurisdictions.[289] Moreover, in cases where the execution of the judgment is expected in a foreign forum, a trial in a German tribunal or any domestic forum is only advisable and effective if there is a sufficient degree of probability that the judgment will be recognized and eligible for execution in the foreign forum.

C. Rejection of the Doctrine

There are many objections to a general incorporation of the *forum non conveniens* doctrine into the German system of civil procedure. These objections arise out of the general rigidity of the

285. BVerfG, 1965 NJW 2291.
286. SCHRÖDER, *supra* note 242, at 490.
287. *Id.* at 489.
288. *Id.*
289. *See* discussion *supra* notes 120-23 (on U.S. development of the doctrine); Blum, *supra* note 234, at 201-02; Schnyder, *supra* note 7, at 143.

German jurisdictional system: the principles of certainty, predictability, and stability of the law; the Federal Constitution; the risk of abuse; and the potential for "negative competence conflicts." The status quo of the judiciary in a re-unified Germany is not likely to be changed in favor of increased judicial discretion.

1. The Rigid Jurisdictional System

In contrast to the U.S. system of civil procedure, the German jurisdictional system provides for rigid rules based solely on facts and party relations.[290] Under German law, no "transient rule" or "minimum contacts" doctrine is available for the creation of excessive jurisdictions. Thus, there exists no countervailing need for extensive limitations on these excessive jurisdictions.[291] Yet, proponents of increased judicial discretion in jurisdictional matters have argued that the German system of civil procedure provides for potentially excessive jurisdiction.[292]

Nevertheless, German rules of civil procedure must generally be applied in a more rigid manner. The civil law system, as opposed to the common law system that constantly revises itself on a case-by-case basis, needs concrete and reliable statutes and codes in order to set applicable standards.[293]

The ZPO includes considerations of appropriateness and suitability to supplement the considerations presently integrated in statutory provisions to serve the average situation.[294] It is, therefore, argued that additional considerations of appropriateness and suitability are repetitive and unnecessary.[295]

A plaintiff could select a permissible, but attenuated, jurisdiction based on options provided at his deposition because the ZPO only contains standards without further judicial evaluation of the actual facts.[296] Thus, in a specific case, the "type and standard" provision of the ZPO could lead to the choice of a less appropriate and extremely remote jurisdiction, when seen from a *forum non conveniens* standpoint. For instance, Section 23 of the ZPO provides broad jurisdiction at the place of the general assets of a per-

290. GRAF, *supra* note 191, at 73.
291. 1 KROPHOLLER, *supra* note 106, at 208.
292. *See* discussion *supra* part VI.B.
293. Blum, *supra* note 234, at 149.
294. Spellenberg, 1978 JA 60.
295. *Id.*
296. 1 KROPHOLLER, *supra* note 106, at 208.

son who does not have any domestic residence,[297] and Section 35 of the ZPO permits the *favor actoris* to select among several available fora.[298]

These theoretically extensive jurisdictions and others following the principle of the *perpetuatio fori* are tolerated by the German legislature as exceptions to the rigid jurisdictional system, as long as their use does not cross the threshold of an "abuse of process."[299] In order to guarantee the highest degree of protection against any possible judicial manipulation, courts are principally bound to the procedural rules and provisions laid out in the statute.

Once a valid constitution has been established by the people or their representatives, the laws promulgated in accordance with this constitution must be followed by all branches of the government. The law creating the ZPO provides for rigid rules, while the courts maintain an obligation to enforce and follow these rules. The strict adherence to the rules within the system can also be regarded as a trade-off for establishing a completely independent judiciary such as the German one. In the German system, judges are appointed, rather than elected, and retain their professional independence.

Nevertheless, in cases involving an "abuse of process," dismissals can be granted on grounds of either the doctrine of "lacking legitimate interest to take legal action" or the principle of good faith. Compared to the scope of the *forum non conveniens* doctrine as applied by U.S. courts, these cases reflect the existence of a certain degree of judicial discretion, which could be applied under a limited *forum non conveniens* doctrine. Yet, there is a theoretical and dogmatic objection to declining jurisdiction according to the doctrine of "lacking legitimate interest to take legal action"—this doctrine cannot be applied at the jurisdictional stage. According to a strict interpretation of the doctrine of "lacking legitimate interest to take legal action," its application would more likely lead to a dismissal for nonsuit than to a lack of international jurisdiction.[300]

Similarly, *forum non conveniens* dismissals are not solely based on a strict lack of jurisdiction, but on a court's refusal to exercise its jurisdiction. Thus, the doctrine could be applied at an

297. ZIVILPROZESSORDNUNG [ZPO] § 23.
298. *Id.* § 35.
299. SCHRÖDER, *supra* note 242, at 488.
300. GRAF, *supra* note 191, at 80.

intermediate stage without interfering with the jurisdiction-determining stage. Such hotly-disputed analogies of the doctrine are generally rejected as being inconsistent with the rigid rules of German civil procedure.

Finally, it is important to recognize that German civil procedure contains some discretionary provisions. These exceptions are intended by the legislature to serve individual justice in particular cases and to avoid the need for a general discretionary doctrine. A general discretionary doctrine would demote the rigid jurisdictional provisions of the German civil procedure to mere rules of presumption, rebuttable at any time through judicial discretion.[301] A general application of the *forum non conveniens* doctrine in German civil procedure would be an *aliud*, contravening the principle of clear and predictable procedural rules.[302]

2. Legal Certainty and Stability

Striking the balance set by the BVerfG between legal certainty and individual flexibility,[303] the majority view favors legal certainty against the individual flexibility offered by the *forum non conveniens* doctrine.[304] The majority bases its opinion on the patent rigidity of German procedural law, which acknowledges few and exclusive exceptions. The legislature intends to provide little discretion at the jurisdictional level.[305]

The majority further contends that there is neither an express formula for the doctrine nor any underlying distinctive or conclusive criteria that could render a *forum non conveniens* decision reasonably predictable.[306] Because principles of predictability and reliability are indispensable characteristics of the German system of civil procedure, they constitute a significant obstacle to judicial discretion.[307]

In addition, the use of terms such as "convenience," "appropriateness," and "suitability" could give rise to increased controversies at the pretrial stage and arbitrary interpretations.[308] Some

301. ZOELLER & GEIMER, ZPO-KOMMENTAR, at intro. E XII 4 (17th ed. 1991).
302. 1 KROPHOLLER, *supra* note 106, at 208.
303. 9 BVerfGE at 223.
304. 1 KROPHOLLER, *supra* note 106, at 209.
305. Blum, *supra* note 234, at 194.
306. GRAF, *supra* note 191, at 80.
307. *Id.* at 73.
308. ZOELLER & GEIMER, *supra* note 301, at intro. E XII 4.

legal scholars and other proponents of the doctrine have attempted to assume certain criteria applied by U.S. courts, such as the private interests of the parties, the availability and access to evidence, procedural justice, and the most suitable forum. Yet, these criteria cannot be applied in the German system of civil procedure without incurring restrictions. Moreover, the use of these criteria still fails to guarantee certain and predictable results.[309]

First, U.S. decisions applying the criteria of the *forum non conveniens* doctrine are not uniform and, therefore, have been described as creating the "chaos of *forum non conveniens*."[310] Furthermore, the catalogue of *forum non conveniens* criteria has become so broad that using even a segment of the criteria would not lead to predictable results.[311] Moreover, criteria established by courts in one legal system cannot be imported without thorough examination of the latent and subtle differences between the systems. It seems apparent that U.S. judges evaluate the criteria with different "moral data" than German judges, particularly with regard to differing external influences and practices in their respective legal systems.[312] Hence, criteria transferred to the German civil law system must be scrutinized carefully to avoid a dramatic shift from a formalistic procedural system to a system of uncertainty, in which excessive judicial discretion only leads to unnecessary disputes.[313]

3. Constitutional Objections

Article 101(I)(2) of the Federal Constitution guarantees every individual claimant a legal judge; this provision is designed to prevent manipulations in determining the judge in a particular case.[314] The BVerfG has permitted the use of indefinite legal terms for this determination, as long as the determination of the legal judge can be inferred from concrete and rigid rules.[315] Thus, an integration of the *forum non conveniens* doctrine would only be permissible if the specific legal judge could be determined with sufficient degree of certainty. This would initially require the formulation of specific

309. WAHL, *supra* note 10, at 133-34; SCHRÖDER, *supra* note 242, at 496-97.
310. A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 150 (1963).
311. *See generally supra* note 278.
312. EHRENZWEIG, *supra* note 310, at 151.
313. Blum, *supra* note 234, at 261.
314. Schütze, 88 ZZP 479 (1975); 1 KROPHOLLER, *supra* note 106, at 209.
315. 9 BVerfGE at 226, 229.

rules or criteria for the application of the doctrine, while also requiring consideration of the problem associated with transferring criteria from one legal system to another.

An additional issue is whether dismissals based on *forum non conveniens* might violate the constitutional right of any person to have recourse to a court of law (*Justizgewährungsanspruch*), a right derived from the principle that the state be governed by the law (*Rechtsstaatsprinzip*).[316] This individual right involves a trade-off for the prohibition against exercising self-help. Yet, this trade-off loses its magnitude with a decrease in domestic elements and the corresponding decrease of the risk of possible violations of law and order.[317] Therefore, while dismissals of actions for lack of domestic elements may generate concern, they generally will not violate this constitutional right.

Nevertheless, judicial discretion during the jurisdiction-determination stage could violate another constitutional principle, namely, that the judge is bound to act pursuant to Article 20(III) of the Federal Constitution.[318] The trial court, however, cannot apply the rules strictly and blindly. Under this viewpoint, some judicial discretion could be permitted without violating Article 20(III) of the Federal Constitution, particularly in non-contentious matters where there is a closer relation between substantive and procedural law.[319]

4. Abuse of Discretion and "Negative Competence Conflicts"

Aside from the dangers of uncertainty and unpredictability, each general discretionary doctrine also bears the inherent risk of abuse. As long as no clear and distinct criteria exist to insure a predictable result, a judge could reject a case by declining to exercise jurisdiction for convenience reasons, or by arbitrarily employing some of the vast catalogue of *forum non conveniens* criteria. If a judge based his decision on a collective evaluation of the criteria, concrete grounds for judicial review would be difficult. Therefore, the doctrine could provide a convenient device for courts to dismiss cases involving foreign elements, application of foreign law, or

316. HARTMANN ET AL., *supra* note 276, pre § 253 n.1A.

317. ZOELLER & GEIMER, *supra* note 301, at intro. C.VI.2a.

318. GRAF, *supra* note 191, at 83.

319. BVerfG, 1973 JZ 665.

conflict of law issues that the court might prefer to avoid.[320] In many cases previously discussed, this discretion has lead to extreme results that are generally guarded against in the civil law system's rigid procedural rules.[321] Hence, it is a matter of jurisprudence and legal philosophy whether procedural rules should be rigidly imposed by the state with a policy towards implementing character, or whether procedure and substance should be merged in the hands of the individual judge.

Application of judicial discretion in the form of a *forum non conveniens* doctrine also bears the risk of so-called "negative competence conflicts," arising from the international jurisdictional system that is generally misapplied outside the applicability of the Convention. Accordingly, the alternative forum, which is considered the *forum conveniens* by the dismissing court, could decline to exercise its jurisdiction as well, leaving the plaintiff without legal protection in a conflict between two courts.[322] In the United States, this risk materializes in a denial of justice to the individual plaintiff, as there are neither binding venue transfers under 28 U.S.C. § 1404(a) nor dismissals or other delegations of cases to a foreign forum.[323]

The Convention prevents the denial of justice within European legal disputes. Even outside the Convention, there are few cases involving the denial of justice within Europe. In *lis alibi pendens*, for example, a pending suit in the alternative forum is always required before the action may be dismissed.

With respect to U.S. courts, on the other hand, *forum non conveniens* dismissals only require potential jurisdiction of an alternative forum, instead of a pending suit. If German courts want to utilize the doctrine and minimize the risk of denying justice, they could follow the established American and English practices of imposing conditions upon defendants before granting stays or dismissals. According to Section 148 of the ZPO, however, the stay of proceedings is permitted only in cases where the decision of another court or administrative agency is necessary and helpful to the pending action. If the alternative forum does not completely dispose of the pending matter, a stay pursuant to Section 148 results

320. FERID, INTERNATIONALES PRIVATRECHT 25 n.1-135 (1975); 1 KROPHOLLER, *supra* note 106, at 211.

321. *See, e.g.*, discussion *supra* part II.G (discussing the Bhopal disaster).

322. GRAF, *supra* note 191, at 86.

323. 1 KROPHOLLER, *supra* note 106, at 211.

in the automatic pending status of the action during the stay, in order to provide the plaintiff with legal protection and avoid denial of justice.[324] It is doubtful that the protection of Section 148 would apply with *forum non conveniens* dismissals or stays, as the German system of civil procedure is generally opposed to imposing conditions. Because Section 148 concerns decisions based on the merits of the case and not preliminary decisions involving jurisdictional issues, however, it could be argued that its protection should apply by analogy. This is generally denied, however, because such procedural rules have to be applied strictly according to the text of the Code and the underlying principle of the rigid rules of German civil procedure.

Although a certain degree of discretion is not entirely alien to German civil procedure, it would be difficult for a German judge to handle an unknown procedural instrument such as the doctrine of *forum non conveniens*, which, even in the country of its main application, is regarded by some as the "chaos of *forum non conveniens*."[325] Due to the lack of existing domestic guidelines for the application of the doctrine, the individual trial judge would have to rely on criteria established in a different legal system.[326] As previously discussed, this process would involve conflicts arising out of the transfer of criteria that are based on different moral attitudes.

VII. CONCLUSION

A. The United States and the United Kingdom

For many years, judicial discretion in jurisdictional matters has been part of the common law system in countries like the United States and the United Kingdom. The *forum non conveniens* doctrine is a widely-accepted part of this tradition of judicial discretion. Yet, even common law countries are facing abundant criticism of the latest developments of the *forum non conveniens* doctrine, criticism that extends to the United States and, after *Spiliada*,[327] to the United Kingdom as well.

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324. GRAF, *supra* note 191, at 87.

325. EHRENZWEIG, *supra* note 310, at 150.

326. Blum, *supra* note 234, at 191, 195.

327. Spiliada Maritime Corp. v. Cansulex Ltd., 1987 App. Cas. 460 (appeal taken from C.A.); *see* discussion *supra* part III.B.2.

In the United States, overly extensive criteria, such as those used in *Great N. Ry. Co.*,[328] have led to an unpredictable, non-uniform, and sometimes "chaotic" application of the doctrine. United States courts have significant jurisdictional reach through the use of "long-arm" statutes and "minimum contacts" tests for specific jurisdiction. In light of this vast jurisdictional power, there is a well-founded rationale for maintaining a system of countervailing discretionary powers that would at least provide theoretical control of the vast judicial power.

Some scholars argue, however, that the courts' current posture, with excessive jurisdictions on one side and liberal discretionary powers to limit jurisdictions on the other, is not final. English scholars, in particular, have optimistically regarded the *Spiliada* decision as just another step in a continuous evolution towards greater objectivity and, thus, impartiality.[329] Yet, English authorities are also aware of the risk of endless controversies that is created by such indefinite legal terms as "most suitable," "appropriate," or "convenient," and consequently have recommended the inclusion of more objective, definite, and reviewable criteria.[330]

At the same time, there are suggestions in the United Kingdom proposing more restrictive requirements for the application of the doctrine in certain areas of the law. Following the U.S. example, these more restrictive requirements should not include concerns of resulting procedural detriments in the alternative forum after a dismissal, completely denying the plaintiff's access to the justice system in that forum.[331] Situations of complete denial of access to the justice system include the denial of *forum non conveniens* dismissals, if the statute of limitations has run in the alternative forum during the period of the domestic proceedings at no fault of the plaintiff. Yet, some countries require extraordinary security deposits at the initiation of proceedings, or deny certain remedies outright, so that the denial of a dismissal to an alternative forum detrimentally affects the defendant. Thus, it has been sug-

328. Great N. Ry. Co. v. Alameda County, 12 Cal. 3d 105, 90 Cal. Rptr. 461 (1970); *see* discussion *supra* part II.F.

329. Slater, *supra* note 150, at 573.

330. *Id.* at 574.

331. *Id.*

gested that the scope of the doctrine should be reasonably extended to consider procedural effects in the alternative forum.[332]

For the United Kingdom, awareness of the developments in the United States may help it to avoid the defects of the U.S. practice and to develop a distinct and separate version of the *forum non conveniens* doctrine. This doctrine, however, will be insignificant, at least in German-English civil and commercial disputes, because those matters are covered by the exclusive provisions of the Convention.

B. Germany

The German system of civil procedure, which is covered by statute, does not have a provision for the potential application of the doctrine of *forum non conveniens*. The idea of judicial discretion in the determination of jurisdictional matters, however, is not completely alien to German civil procedure. Judicial history, statutory genesis, and statutory reality, as well as other discretionary doctrines, permit this inference. Not only do the German courts and legislature intend to integrate some discretionary rules, but there are already certain statutory provisions that permit judicial discretion in jurisdictional matters. Moreover, judicial discretion resembling a *forum non conveniens* doctrine is particularly present in the treatment of cases involving jurisdictions based on the extensive doctrine of *perpetuatio fori*. Thus, the core principles of the German system of civil procedure—certainty and predictability of the law—are not absolute.

The statutory provisions in the ZPO that actually define a court's judicial discretion in jurisdictional matters must be regarded as absolute and exclusive exceptions in a generally rigid system, rather than indications of a general need for a *forum non conveniens* doctrine. Eventually, the choice between certainty and predictability of the law on one hand and individual justice on the other has been made by the BVerfG in favor of certainty and predictability.[333]

Despite the contentions of the doctrine's proponents, no such excessive jurisdictions are generally permitted under German law as they are under U.S. law through the "transient rule," "long-arm statutes," or "minimum contacts." Jurisdictions that are consid-

332. *Id.* at 575.

333. 1 KROPHOLLER, *supra* note 106, at 209.

ered extensive under German law, such as those provided by Sections 23 and 35 of the ZPO, must be considered within the parameters of the system, i.e., as long as no abuse of the system occurs necessitating judicial intervention. If, on the other hand, an abuse of the system should occur, existing doctrines and procedural principles, such as the doctrine of "lacking legitimate interest to take legal action" and the "good faith" requirement of Section 242 of the BGB, provide sufficient tools to remedy the situation without resorting to a general discretionary doctrine of the judiciary.[334] Furthermore, although it has denied the courts flexibility in determining and exercising their jurisdiction according to the best interests of the parties, the German legislature has always maintained that considerations of suitability and appropriateness have already been standardized as part of the statutorily-determined rigid jurisdictions.

The doctrine of "lacking legitimate interest to take legal action" theoretically applies in areas covered in the United States by *forum non conveniens*, and somehow resembles the "abuse of process" version of the doctrine. These doctrines cannot be fairly compared with each other, however, due to the limited applicability of the doctrine of "lacking legitimate interest to take legal action." That doctrine is restricted to decisions on the merits, in order to prevent the courts from denying a plaintiff access to a proceeding at the jurisdictional stage. Therefore, a general doctrine of judicial discretion in jurisdictional matters can neither be introduced into a rigid system like the German one, nor into any civil law system that is characterized and dominated by ideas of formal procedure.[335]

In addition, because the principle of *actor sequitur forum rei* generally provides strong protection for the defendant, no further protection of the defendant by virtue of the *forum non conveniens* doctrine is necessary.[336] Application of the doctrine would cause unreasonable detriment to the plaintiff, a danger existing in common law countries. Accordingly, scholars have noted that "caution has to be exercised if the doctrine is not to become a powerful

334. BGH, 1983 NJW 1269, at 1270; Slater, *supra* note 150, at 574.

335. This holds true particularly after the German reunification and the accompanying increased degree of legal certainty and predictability in the Eastern parts of the country, which have been badgered by a corrupt system over centuries.

336. SCHRÖDER, *supra* note 242, at 497.

weapon in the hands of the defendant."[337] Other common law countries besides Germany and Australia have refused to apply the doctrine any further, after a long period of its application.[338] Yet, both Israel, which follows the common law tradition, and Canada have acknowledged and integrated the doctrine into their systems of civil procedure.[339]

Therefore, incorporation of a general doctrine of *forum non conveniens* would conflict with the rigid German system of civil procedure and would unreasonably extend protection for the defendant. Although certain procedural devices under German law partly resemble the *forum non conveniens* doctrine and allow judicial discretion, these devices are sufficient whenever individual discretion is necessary to prevent undue hardship. Thus, there is no present need for a German *forum non conveniens* doctrine, particularly due to the encumbrances involved in its application.

337. 1 KROPHOLLER, *supra* note 106, at 209.

338. Oceanic Sunline Special Shipping Co. v. Fabian Roscoe Faye, [1988] A.L.R. 9 (Austl.).

339. Kurt Siehr, 1988 RIW 909; Plibrico Ltd. v. Suncor, Inc., 35 O.R.2d 781 (1982).